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In the Supreme Court of the United States

OCTOBER TERM, 1985

HIBERNIA NATIONAL BANK IN NEW ORLEANS
Petitioner,

Versus

CHUNG YONG IL, et al.
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI BY HIBERNIA NATIONAL BANK IN NEW ORLEANS

George A. Frilot, III
Terry A. McCall
LEMLE, KELLEHER, KOHLMEYER, DENNERY, HUNLEY, MOSS & FRILOT
21st Floor, Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241

Robert Coury
General Counsel,
Hibernia National Bank

ATTORNEYS FOR
Hibernia National Bank In
New Orleans

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

10 1pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the recovery of a double wage penalty pursuant to 46 U.S.C. 596, currently restated as 46 U.S.C. 10313, contingent upon (1) a vessel having scheduled or actually having commenced a voyage and (2) upon crewmembers agreeing to serve during that voyage pursuant an agreement in the nature of shipping articles; as strongly suggested by a **UNANIMOUS SUPREME COURT** in *Pacific Mail S.S. Co. v. Schmidt*, 241 U.S. 245 (1916), and as held by the **FOURTH CIRCUIT** in *Eaton v. S.S. EXPORT CHALLENGER*, 376 F.2d 725 (4th Cir. 1967) and *Compton v. Alton S.S. Co.*, 608 F.2d 96 (4th Cir. 1979)

-OR-

as held by the **ELEVENTH CIRCUIT**, may a national bank be assessed penalty wages in excess of $1,300,000.00 for delayed payment of wages to 23 Koreans for maintenance work performed aboard a vessel acquired in a foreclosure proceeding - when the vessel was tied to a dock during the work period, no voyage was scheduled or commenced and no agreement to ship out was made or executed between the bank and any of the Koreans?

2. Does "constructive payment" by depositing with the District Court a national bank's unequivocal letter of undertaking to pay any judgment decreed by the court constitute "sufficient cause" to toll the running of penalty wages, as suggested by the **SURPREME COURT** in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, Footnote 9 (1982) and the opinions of the **THIRD AND FOURTH CIRCUITS** in *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3rd Cir. 1966), *Southern Cross S.S. Co. v. Firipis*, 285 F.2d

651 (4th Cir. 1960), respectively.

-OR-

as held by the **ELEVENTH CIRCUIT**, are penalty wages to run until the date of actual payment - in **DEROGATION OF THE BANK'S CONSTITUTIONAL RIGHT TO LITIGATE WITHOUT THREAT OR INTIMIDATION?**

3. Does taking a good faith appeal coupled with a stay of execution and the posting of appropriate security constitute "sufficient cause" to interrupt the running of the double wage penalty as was specifically held by the **SUPREME COURT** in *Pacific Mail S.S. Co. v. Schmidt, supra.*

-OR-

as found by the **ELEVENTH CIRCUIT**, does the penalty stop "...only when the wages are paid" - thus **IMPINGING UPON THE BANK'S RIGHT TO APPEAL AN ADVERSE DECISION BY A FEDERAL DISTRICT COURT?**

4. Does public policy permit private citizens to contract for indemnification of civil penalties where the obligation of the indemnitee to pay the penalty is undiminished - as held in analagous cases decided by the **SUPREME COURT** and several **CIRCUIT COURTS**

-OR-

as found by the **ELEVENTH CIRCUIT**, does public policy render such agreements unenforceable?

LIST OF PARTIES

1. Chung Yong IL and the officers and crew of the M/V BEAVER SPIRIT, O. Weon bog; Im, Gyeong Cheol; Gang, Hai Lyong; Jo, Yang Myung; You, Bong Gie; Yu, Dong Jyu; Yi, Hi Un; Kim, Tea Ik; Kim, Jeong Ro; Lee, bong Bum; Yu, Chang Bok; Im, Gwangg Su; Kim, gi Hwi; Jang, Ho Sam; Han, Jong Yeol; Sin, Gyeong U; Bak, Yeong Han; Song, Il Sick; Tak, Kil Ji; Jeo, Yu Ong; Son, cheol Geun; Lee, Jae Ho.

2. Hanseung Shipping Co., Ltd.

3. Overseas Navigation Company, Ltd.

4. Jimmy Mardikos

5. Hibernia National Bank in New Orleans

6. M/V CARMEN A - a/k/a M/V BEAVER SPIRIT

7. E.F.D. Capital Group, Inc.

8. Frank Deutsch

9. R. S. Price

TABLE OF CONTENTS

Page

Questions Presented For Review.....i
List of Parties.....iii
Table of Contents.....iv
Table of Authorities.....vi
Reports of Opinions Below.....1
Grounds for Jurisdiction in the Supreme Court.....1
Statutory Provision Involved.....2
Statement of the Case.....2
Basis for Federal Jurisdiction in the District Court.....3
Reasons for Allowance of the Writ.....4

I. **Contrary to the Eleventh Circuit's Holding, the Supreme Cout has strongly suggested and the Fourth Circuit has held that the provisions of 46 U.S.C. 596, recodified in 46 U.S.C. 10313, do not apply to work performed aboard a vessel tied to a dock, with no voyage scheduled or commenced and no articles or other agreements for a voyage having been reached or executed by the workmen aboard the vessel and her owner.....4**

II. **Contrary to the Eleventh Circuit's holding, the Supreme Court has strongly suggested and the Third and Fourth Circuits have clearly stated that payment into the hands of the court of the alleged unlawfully withheld wages will terminate the running of penalties so as not to deprive the defendent of his constitutional right to a fair trial on the issue.....13**

III. **Contrary to the Eleventh Circuit's holding, the Supreme Court has held that an appeal**

taken on reasonable grounds constitutes sufficient cause for non-payment of wages and tolls the penalty. Were it otherwise, a shipowner's right of appeal would be severely impaired.....16

IV. Contrary to the Eleventh Circuit's holding, analogous cases in the Supreme Court and other circuit courts of appeal have held that public policy permits private parties to contract for indemnification of penalties provided the indemnitee's statutory duty to pay the penalty is not adversely effected.....19

Certificate of Service.....23

Appendix:

A - Statutes and Conventions.....A-1
B - Order of Court of Appeals denying Petition for Rehearing.....A-12

C - Decision of Court of Appeals Reversing and Remanding.....A-16

D - Opinion of District Court, as corrected.....A-44

TABLE OF AUTHORITIES

CASES **PAGE**

Collie v. Fergusson, 281 U.S. 52, 50 S.Ct. 189 74 L.Ed 696 (1930).....22

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982).....18

Pacific Mail S.S. Co. v. Schmidt, 241 U.S. 245, 36 S.Ct. 581, 582, 60 L.Ed. 982 (1916).....4

Transamerican FR. Lines v. Brada Miller FR. Sys., 423 U.S. 28, 96 S.Ct. 228, 46 L.Ed.2d 169 (1975).....21

The *ADA*, 250 F.2d 194 (2nd Cir. 1918).....20

Caribbean Federal Line v. Dahl, 315 F.2d 370 (5th Cir.), *cert. denied* 375 U.S. 381, 84 S.Ct. 76, 11 L.Ed.2d 62 (1963).....9

Chicago R.I. and P.R. Co. v. Chicago B. & Q. R. Co., 437 F.2d 6 (7th cir. 1971), *cert. denied* 402 U.S. 996, 91 S.Ct. 2173, 29 L.Ed.2d 161 (1971).....21

Chung Yong IL v. Overseas Navigation Co., Ltd. 774 F.2d 1043 (11th Cir. 1985).....6,9,10,12,17,18

Compton v. Alton S.S. Co., 608 F.2d 96 (4th Cir. 1979).....6,9

Eaton v. S.S. EXPORT CHALLENGER, 376 F.2d. 725 (4th Cir. 1967).....5,6

Ktistakis v. Liberian S.S. STAR, 304 F.2d 356 (4th Cir. 1962).....12

CASES **PAGE**

Mystic S.S. Co. v. Stromland, 20 F.2d 342, Rehearing den. 21 F.2d 607 (4th Cir. 1927).....13

Griffin v. Oceanic Contractors, Inc., 664 F.2d 36 (5th Cir. 1981) rev'd 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982).....6,8,9,10

Pacific Mail S.S. Co. v. Schmidt, 214 F. 513, 521 (9th Cir. 1914), rev'd 241 U.S. 245, 36 S.Ct. 581, 60 L.Ed. 982 (1916).....5,14,17,18

Richard Bertram & Co. v. Yatch WANDA, 447 F.2d 966 (5th Cir. 1971).....20

Ryan Mercantile Co. v. Great Northern R. Co., 294 F.2d 629 (9th Cir. 1961).....21

Southern Cross S.S. Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960).....14

Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3rd Cir. 1966).....13

Flota Maritime v. M/V CIUDAD de la HABANA, 181 F.Supp. 301 (D.Md.) affirmed 335 F.2d 619 (4th Cir. 1966).....20

Schmidt v. Pacific Mail S.S. Co., 209 F. 264, (N.D. Cal. 1913), 214 F. 513 (9th Cir. 1914) rev'd 241 U.S. 245 36 S.Ct. 581, 60 L.Ed 982 (1916).....5

CONVENTIONS, STATUTES AND REGULATIONS:

Convention Concerning Seamen's Articles of Agreement 38 U.N.T.S. 295; 6A *Benedict on Admiralty*, (7th Ed.) Doc. 9-1, p.9-4.....12

8 U.S.C. 1184.....16
46 U.S.C. 563.....12
46 U.S.C. 564.....7,12
46 U.S.C. 596.....2,3,4,5,6,7,8,10,11,12,14
46 U.S.C. 597.....7
46 U.S.C. 10313.....3,4
8 C.F.R. 253.....16
House Report No. 98-338, p. 113, 2 USCAN, 924
(98th Congress 1983).....7

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ON WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Hibernia National Bank in New Orleans, through undersigned counsel, petitions for a Writ of Certiorari to review the decree of the United States Court of Appeals for the Eleventh Circuit.

REPORTS OF OPINIONS BELOW

The opinion of the court of appeals (Appendix C) reported at 774 F.2d 1043. The opinion of the district court (Appendix D) is not reported.

GROUNDS FOR JURISDICTION IN THE SUPREME COURT

The decree sought to be reviewed is dated October 25, 1985, and corrected on October 30, 1985 (Appendix C). A petition for rehearing and suggestion of *en banc* consideration was filed on November 11, 1985, and denied on

November 29, 1985 (Appendix B). The certiorari jurisdiction of the Surpeme Court of the United States is invoked under 28 U.S.C. §1254(1), as this matter involves a split between circuits, a disregard of this Court's decisions, a violation of the Constitutional right to a trial and to an appeal from an adverse holding and other significant matters which should be resolved.

STATUTORY PROVISION INVOLVED

46 U.S.C. 596, repealed and recodified in 46 U.S.C. 10313 (Appendix A).

STATEMENT OF THE CASE

The Hibernia National Bank in New Orleans seized a Liberian vessel in Mobile to foreclose on a defaulted loan. After a foreclosure sale to Hibernia, the Bank arranged to resell the vessel. The prospective purchaser's agent, in turn, entered into an agreement with a Korean company, Hanseung, to procure a crew to man the vessel - the agreement being contingent upon a completed sale. Thereafter, with Hibernia's consent, the Koreans were brought to Mobile to perform maintenance required to reinscribe the vessel under Panamanian registry. While the Koreans worked aboard, the vessel was tied to the dock. The sale was frustrated and Hibernia ordered the crew off the vessel, refusing demands to pay the Koreans' wages on the grounds the responsibility belonged to those who hired them.

Suit was filed on behalf of the Koreans for wages and penalties against the vessel and Hibernia, among others. A $400,000.00 letter of undertaking was posted to secure the release of the vessel and the payment of a judgment against Hibernia. The Trial Court entered judgment

against Hibernia for wages, severance pay, penalties and pre-judgment interest in favor of each seaman for a single amount combining all elements of the award without delineation. Hibernia noticed an appeal and obtained an order staying execution upon increase of its undertaking to $782,181.00.

The Eleventh Circuit panel issued an opinion and corrected opinion dated October 25, and October 30, 1985, respectively. The panel rejected Hibernia's arguments that commencement of a voyage and an agreement under which the seamen shipped were missing prerequisites to the application of penalty wages under the statute. The panel further held the Trial Court erred in tolling the penalty as of the trial date and remanded with instructions to apply the penalty until the date of payment of the earned wages. Not disputing the provisions of the vessel sale contract required the prospective purchasers to indemnify Hibernia for reinscription costs, including wages and penalty wages, the panel sustained such indemnity provisions, except it found indemnity with respect to penalty wages unenforceable as contrary to "public policy." Thereafter rehearing and consideration *en banc* were denied.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

This action involves the claims for the statutory double wage penalty set forth in former 46 U.S.C. §596 (now 46 U.S.C. 10313) of persons employed aboard the M/V CARMEN A (a/k/a: M/V BEAVER SPIRIT), and accordingly, is based on a federal question and the admiralty and maritime jursidiction of United States courts, 28 U.S.C.

1331 and 1333.

REASONS FOR ALLOWANCE OF THE WRIT

I.

CONTRARY TO THE ELEVENTH CIRCUIT'S HOLDING, THE SUPREME COURT HAS STRONGLY SUGGESTED AND THE FOURTH CIRCUIT HAS HELD THAT THE PROVISIONS OF 46 U.S.C. 596, RECODIFIED IN 46 U.S.C. 10313, DO NOT APPLY TO WORK PERFORMED ABOARD A VESSEL TIED TO A DOCK, WITH NO VOYAGE SCHEDULED OR COMMENCED AND NO ARTICLES OR OTHER AGREEMENTS FOR A VOYAGE HAVING BEEN REACHED OR EXECUTED BY THE WORKMEN ABOARD THE VESSEL AND HER OWNER.

> "But it is far less clear that the district court was justified in treating the case as within the penalties of the act. **The statute deals with voyages**...No new articles had been signed, and it would seem on the allegations of the libel, coupled with the admitted facts, that the libellant's legal standing was under an oral contract for a few days in port while hoping to be reshipped. **It seems to us a very strong thing to say that any fair construction of the facts brings the case within the act.**" (Emphasis supplied)

These are the words of Mr. Justice Holmes who delivered the unanimous opinion of the Supreme Court in *Pacific Mail S.S. Co. v. Schmidt.*[1] Because the Supreme Court deemed

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[1] 241 U.S. 245, 36 S.Ct. 581, 60 L.Ed. 982 (1916)

that lower courts had held that the penalty wage statute applied *and the scope of the writ of certiorari did not extend to reopen the question,* the result below was not officially disturbed. The decision of the Circuit Court of Appeals was reversed on other grounds. However, in *Eaton v. S.S. EXPORT CHALLENGER,*[2] the Fourth Circuit examined the findings of the lower courts in *Pacific Mail* and commented on the Surpeme Court's assumption with respect to the proceedings below:

> "An examination of the two opinions below indicates that the assumption made by the Court was a violent one. The district court's opinion did not expressly consider the applicability of the statute. *Schmidt v. Pacific Mail S.S. Co.*, 209 F. 264 (N.D. Cal. 1913). The Circuit Court of Appeals thought that the services for which the libel was brought were rendered under the articles. *Pacific Mail S.S. Co. v. Schmidt*, 214 F. 513, 520 (9th Cir. 1914). It was, of course, a complete answer that certiorari had not been granted to review the question."[3]

Before the case at bar, the words of Justice Holmes had been heeded on the occasions federal appellate courts were called upon to review similar circumstances. The Fourth Circuit, citing *Pacific Mail,* concluded in *Eaton* that:

> "...the natural and ordinary meaning of §596 is that it has no application to work performed on port time, that is, when a vessel is tied up in the interim between the completion of one voyage

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[2] 376 F.2d 725 (4th Cir. 1967)

[3] *Id.* at 727 n. 3

> and the commencement of another and when articles are neither in fact signed nor required."[4]

In *Compton v. Alton S.S. Co.*,[5] the Fourth Circuit reitereated its earlier conclusion that §596 had no application to wages earned while a vessel is on port time.

The Eleventh Circuit chose to be out of step with both the Supreme Court and the Fourth Circuit, stating:

> "There are no cases binding on us that hold that the penalty wage statute requires a completed voyage, or that discuss the Fourth Circuit's 'port time' doctrine."[6]

The Surpeme Court's resolution of the conflict between circuits will not only eliminate precedent for future "absurd and palably unjust" results,[7] but at the same time will reverse an even more compelling injustice than existed in either *Compton* or *Eaton* and one clearly within the ambit of the observations by Justice Holmes.

Hibernia owned a vessel solely because of a foreclosure. It never intended to operate the vessel or to allow the vessel to leave port unless and until sold. On the contrary, selling the vessel on the best terms possible at the earliest possible time was the bank's only desire. The vessel never left port, a fact absolutely undisputed. The issue is whether under such circumstances the penalty wage

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[4] *Id.*

[5] 608 F.2d 96 (4th Cir. 1979)

[6] 774 F.2d 1043, 1050 (11th Cir. 1985)

[7] *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 586, 102 S.Ct. 3245, 3258, 73 L.Ed.2d 973 (1982) (Stevens J. Dissenting)

provisions apply. The statute, the precedent interpreting its provisions and the more recent recodifiction of Title 46 command a negative response - the penalty provisions do not apply.

The provisions of 46 U.S.C. 596 set forth the rights of a seaman to wages if discharged without sufficient cause while serving aboard a vessel "**making coasting voyages**" or "**making foreign voyages.**" The section was repealed and recodified, but the substance of the former statute remains intact. Its interpretation by this Court will have a continuing effect upon the maritime community. The 1983 revision of Title 46 had ultimate aims which included "making it more understandable for everyone involved."[8] The framers of the revision "sought to insure that this bill not take away any existing rights, benefits or privileges from any person, nor place any greater duties or obligations on any person."[9]

The new 46 U.S.C. 10313 has as its source the former 46 U.S.C. 591 through 598. Former 46 U.S.C. 594 is preserved in subsection (c) which applies to a seaman improperly discharged "before the beginning of the voyage." Former 46 U.S.C. 596 and 597, as restated by Congress, appear in subsections (e) through (g), and significantly, apply only "after the beginning of a voyage" or "at the end of a voyage."

Under the old or the new statute, when does a voyage begin and end? Premised upon the Eleventh Circuit's opinion, future claimants may contend a voyage begins when a crewman comes aboard and ends when he departs the vessel. They may likewise contend that if Congress had in

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[8] House Report No. 98-338, p. 113, 2 USCAN, 924 (98th Congress 1983).

[9] *Id.* at 119.

tended to impose a requirement that a vessel leave the dock for a voyage to commence, it could have chosen clearer language than is in the former or the new statute. Such arguments stretch the rules of strict and literal construction required of this section by this Court's decision in *Griffin v. Oceanic Contractors,*[10] but little more than the Eleventh Circuit's view that if Congress intended to impose a voyage requirement in 46 U.S.C. 596 it should have chosen clearer language than "any vessel making coasting voyages" or "vessels making foreign voyages."

The Eleventh Circuit's attempts to justify its position are strained and uninspiring. The Court states:

> "We think our position is reconcilable with the Fourth Circuit's cases decided under the port-time doctrine. The court below found that the crew's service aboard the M/V CARMEN A was governed by the terms of an employment contract. Although it was not executed individually be the crew members, it was nonetheless a contract. Both *Compton* and *Eaton* involved seamen whose service aboard a vessel had terminated according to their signed articles. Both had been paid wages due under the terms of their articles, and *both had claimed additional amounts due for periods not covered by any agreement calling for the service aboard a vessel.* Hence, even assuming we were to adopt the port-time doctrine, it would not apply to this case." (Emphasis supplied).[11]

It is inconceivable that a panel of three could make such a statement. During the pertinent period in *Eaton* the plain-

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[10] 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)

[11] 376 F.2d 725, 726, n. 1.

tiff was on "port time", which the Fourth Circuit explains "...is day to day **employment aboard ship** in port at a time when the ship is between voyages." (Emphasis supplied).[12] True, in *Compton* the plaintiff claimed wages under a union contract providing for renumeration "when a vessel is inactive in a United States port", a period during which Compton "reported back to the vessel each day"[13] to determine if there was work to be done. However, both cases clearly involve an agreement to perform work aboard a vessel which did not make a voyage and the cases are totally irreconcilable with the Eleventh Circuit's opinion.

The Eleventh Circuit looked further to the Fifth Circuit seeking support for its result. Two cases are cited: *Caribbean Federal Line v. Dahl*[14] and *Griffin v. Oceanic Contractors, Inc.*[15] Each exemplifies the strain applied to achieve the result reached.[16]. The Eleventh Circuit concedes that in *Dahl* penalty wages were awarded to seamen "**who signed one-year agreements to serve with a ship.**"[17] and who travelled aboard that ship "**from Pascagoula to Mobile**"[18] where the vessel was to be drydocked for repairs.

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[12] 376 F.2d 725, 726, n. 1.

[13] 608 F.2d 96, 98, (4th Cir. 1979)

[14] 315 F.2d 370 (5th Cir.), *cert. denied* 375 U.S. 381, 84 S.Ct. 76, 11 L.Ed.2d 62 (1963)

[15] 664 F.2d 36 (5th Cir. 1981), 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)

[16] Parenthectically, *Dahl* was a case decided by the same district judge as in the case at hand and counsel for plaintiff was the father of counsel for plaintiff in the present case.

[17] 774 F.2d 1043, 1051 (11th Cir. 1985)

[18] *Id.*

(Emphasis supplied). The Eleventh Circuit found *Dahl* to be supportive precedent notwithstanding the vessel made a the voyage to Mobile because, in the words of the Eleventh Circuit, "**the court was aware that the vessel never made a cargo voyage.**"[19] (Emphasis supplied).

Less strain was applied to the Eleventh Circuit's reliance on *Griffin.* In that case an employment agreement had been *signed* by the seamen and a voyage was clearly intended. After signing his agreement, the plaintiff in *Griffin* travelled to Antwerp where Lay Barge 27 was berthed for repairs. Three weeks later the plaintiff was injured on the deck of the vessel while "readying it for sea."[20] Whether the vessel had moved from its repair berth or had engaged in other activities synonymous with commencement of a voyage is not clear from the reported opinion. What is clear is that an agreement had been executed between the seaman and the shipowner for the intended voyage which had or was to commence.

This leads to a brief discussion of the facts necessary to comprehend the extent of the Eleventh Circuit's departure from strict construction in the interpretation of the requirement of 46 U.S.C. 596 that there be an "agreement under which he (the seaman) was shipped."

The Trial Court made the following finding:

> "On or about June 4, 1981, the Defendants, Mardikos and Overseas entered into a contract with Hanseung Shipping Co., Ltd., of Busan, Korea, wherein Haneung agreed to locate and

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[19] *Id.*

[20] 458 U.S. 564, 566, 102 S.Ct. 3245, 3248, 73 L.Ed.2d. 973 (1982)

> send to the vessel a competent crew for its operation, *which crew* **was to be employed** *by one or more of the Defendants herein.* The contract establishes the wages payable to the crew after their employment and sets the amount payable to Hanseung Shipping as fees for its services and for reimbursement of expenses." (Emphasis supplied)[21]

This was clearly an agency agreement whereby Hanseung agreed to procure a crew to be employed pursuant to the terms outlined in the agency agreement. Not one of the seamen was party to the agreement. **Of major importance, the agreement was conditioned upon finalization of the vessel's sale by Hibernia.**

Were the Koreans advised by Hanseung the vessel's sailing was contingent upon her sale? The record is silent. If the crew was not advised, then Hanseung exceeded its agency authority. If, on the other hand, the Koreans were aware the vessel would sail only if the sale was consummated, then there was never an agreement under which the individual seamen shipped - as required by 46 U.S.C. 596. The Koreans were employed by Hanseung to come to Mobile and commence maintenance work in preparation for sailing - an event which all concerned knew or should have known was contingent upon the vessel sale. If the sale was frustrated, so was the sailing. There would be no voyage and no agreement under which the seamen "shipped".

Hibernia argued the agreement of each seaman to ship aboard the M/V CARMEN A ought to have been in the form of shipping articles such as required by former 46

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[21] Appendix D

U.S.C. 563 and 564. The Fourth Circuit in *Ktistakis v. Liberian S.S. STAR,*[22] suggested former 46 U.S.C. 564 applied literally to vessels *owned by Americans regardless of flag,* such as Hibernia's vessel, but found on its facts nothing establishing American ownership. Even the Eleventh Circuit panel noted, 46 U.S.C. 564 ". . . . by its very terms applies only to *American-owned* vessels".[23] As Hibernia is an American citizen, it is reasonable individually signed shipping articles would have been the form of "agreement under which (the Korean seamen) were shipped" had there been an intended voyage. Alternatively, if the flag of the vessel governed, the 1926 "Convention Concerning Seaman's Articles of Agreement" controlled.[24] The convention was ratified by both Liberia and Panama, the flags of the vessel while at dock in Mobile. The Convention requires "Articles of Agreement shall be signed both by the shipowner or his representative and by the seaman."[25] The form of the articles prescribed by the Convention is quite similar to those prescribed by the law of the United States.

There was evidence of an agreement to procure a crew to perform shipboard maintenance. There was no evidence of an "agreement under which (the Korean seamen) were shipped." Had the Koreans agreed to ship out on a voyage, by law they should have executed individual agreements (shipping articles) as prescribed either by the statutes of the United States or by the "Convention Governing Seamen's Articles." Any reasonable construction, strict or liberal, places this case beyond the ambit of 46 U.S.C. 596.

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[22] 304 F.2d 356 (4th Cir. 1962)

[23] 774 F.2d 1043, 1049 (11th Cir. 1985)

[24] 38 U.N.T.S. 295; 6A *Benedict on Admiralty,* (7th ed.) Doc. 9-1, p. 9-4; Appendix A

[25] *Id.* Article 3(1)

II.

CONTRARY TO THE ELEVENTH CIRCUIT'S HOLDING, THE SUPREME COURT HAS STRONGLY SUGGESTED AND THE THIRD AND FOURTH CIRCUITS HAVE CLEARLY STATED THAT PAYMENT INTO THE HANDS OF THE COURT OF THE ALLEGED UNLAWFULLY WITHHELD WAGES WILL TERMINATE THE RUNNING OF PENALTIES SO AS NOT TO DEPRIVE THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL ON THE ISSUE.

> **"* * * * It was certainly not the intention of Congress that the statute should be construed in such way as virtually to deny to shipowners the right to contest liability in cases of this sort, by making the penalties so great in case of failure to maintain the defense asserted as to deter them from making any defense at all."[26]**

This concern was given careful consideration by the Third Circuit in *Swain v. Isthmain Lines, Inc.*[27] In the course of that consideration, the Third Circuit stated:

> "Indeed, in our view, the most adequate protection a shipowner has against accumulating penalties once a libel is filed is to place in the hands of the court alleged unlawfully withheld wages."[28]

The Court noted that a similar approach was taken and

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[26] *Mystic S.S. Co. v. Stromland*, 20 F.2d 342, 344-345, rehearing den. 21 F.2d 607 (4th Cir. 1927).

[27] 360 F.2d 81 (3rd Cir. 1966)

[28] *Id. at 87-88, n.26*

made mandatory in *Southern Cross S.S. Co. v. Firipis*[29]. Both circuits made clear that such a fund would terminate the running of penalties as of the date of its creation to the same extent as actual payment. Were it different, as is suggested by the Eleventh Circuit, the defendant shipowner would be deprived of his right to a fair trial on a contested issue.

The severity of the penalty set forth in 46 U.S.C. 596 is perhaps the harshest civil penalty in all of federal law. Its harshness has been noted by this and most of the courts which have dealt with its application. However, as was aptly stated in the dissenting Court of Appeals' opinion in *Pacific Mail*[30]

> " . . . as to the severity of the penalty, there is, of course, no thought of suggesting that a court can properly decline to enforce a statute because it may seem to be unnecessarily harsh."

We do not suggest that here. We merely emphasize that the penalty is extraordinarily severe. The earned wages and other benefits found due the 23 Korean seamen in this case, which were paid during the pendency of the appeal,[31] amounted to $80,971.66 including pre-judgment interest.

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[29] 285 F.2d 651 (4th Cir. 1960)

[30] *Pacific Mail S.S. Co. v. Schmidt*, 214 F. 513, 521 (9th Cir. 1914), rev'd. 241 U.S. 245, 36 S.Ct. 581, 60 L.ed. 982 (1916)

[31] During the appeal, Hibernia abandoned review of the intricate factual issues, limiting its appeal to application of the penalty wage statute. Hibernia attempted to deposit with the Court of Appeals funds to satisfy the award for earned wages, severance pay and interest. Ultimately a partial satisfaction was entered in the District Court after a payment agreed by counsel to satisfy all elements of the award other than penalties was made.

The penalty as applied by the Eleventh Circuit results in a sum approximately 1600% of that amount or in excess of $1,300,000.00 To subject the defendant shipowner to such a penalty even after the contested wages - or security for their payment - is deposited with the court of first instance is to effectively deprive the defendant of his day in court.

If as here, the claim of the seaman is protected by depositing security with the District Court, what more can a shipowner do without losing his right to litigate? If the shipowner has provided security to the court what further function does the penalty wage statute serve? The shipowner can no longer speed the process which is now dependent solely upon delays inherent in the judicial system. The continuing penalty prompts no further payment, for such further payment would negate the shipowner's right to litigate. At this point the sole effect of the penalty is to punish the shipowner, not for his failure to pay, but for the exercise of his constitutional rights in a court of law. Thereafter the penalty neither promotes the aims of the statute or furthers the ends of justice. It is punishment, pure and simple, vindictive and unreasonable. It serves no policy ends and merely enriches crewmembers if they are successful. Like the worm on the baited hook, the shipowner has no place to go and nothing to do but wiggle in discomfort.

The policy purposes of the statute are in no way enhanced by an ever increasing penalty. The rationale is that our shores should not be cluttered with destitute seamen. Whatever may have been the circumstances in the nineteenth century when our ports teemed with men of no money waiting for a ship, the world is far beyond that era.

Foreign seamen are removed from our shores either as a result of the actions of their government, as a result of the actions of those who have directly employed them, such as Hanseung here, or as a result of the actions of our own Immigration and Naturalization Service.[32] Once such seamen are repatriated to their homelands, no policy is served by simply enriching foreign seaman who are no longer in the United States.

Hibernia has argued that any delay in payment after security to the extent of the then existing wage claims and penalties is posted with the District Court constitutes "sufficient cause" not to pay continuing wage penalties. Inasmuch as "payment" is a defense to the assertion of a claim, constructive payment to the District Court of a sum sufficient to cover existing wage and penalty claims should be recognized as a defense of "sufficient cause" for not then paying the outstanding amounts due. To hold otherwise makes a mockery of a shipowner's right to contest the terms upon which he employs seamen. To hold otherwise elevates the penalty statute above the civil rights of shipowners seeking relief in our judicial system.

III.

CONTRARY TO THE ELEVENTH CIRCUIT'S HOLDING, THE SUPREME COURT HAS HELD THAT AN APPEAL TAKEN ON REASONABLE GROUNDS CONSTITUTES SUFFICIENT CAUSE FOR NON-PAYMENT OF WAGES AND TOLLS THE PENALTY. WERE IT OTHERWISE, A SHIPOWNER'S RIGHT OF APPEAL WOULD BE SEVERELY IMPAIRED.

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[32] 8 U.S.C. 1184 and 8 C.F.R. 253.

In its haste to dispose of the issue of the tolling of the penalty prior to judgment, the Eleventh Circuit again committed egregious error by ignoring this Court's unamimous decision in *Pacific Mail*. The holding of *Pacific Mail* is clear and concise: (1) the wage penalty runs only when delay in payment is coupled with "insufficient cause" for the delay; and (2) the pendency of an appeal is a delay period of "sufficient cause."

In this instance the Eleventh Circuit chose to disregard the precise holding of *Pacific Mail*, stating:

> "... accural of the penalty should stop only when wages are paid ...."

and

> "remanded for reassessment of the penalty to include accrual until the date of payment."[33]

By directing penalty inposition to the date of actual payment of earned wages, which was during pendency of the the appeal, the Eleventh Circuit has committed the error so roundly condemned in *Pacific Mail* and overlooked this Court's continued support for *Pacific Mail* as expressed in *Griffin*:

> "Finally, we note that our holding is consistent with *Pacific Mail S.S. Company v. Schmidt*, 241 U.S. 245, 36 S.Ct. 581, 60 Law. Ed.982 (1916). The employer in that case challenged the decision by the Court of Appeals to apply the penalty wages to delay after the District Court's judgment occa-

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[33] 774 F.2d 1043, 1051 (11th Cir. 1985)

> sioned by the employer's appeal. The Court held that on the facts of that case, **application of the penalty beyond the date of the District Court's judgment was error**. . . .Instead the Court held the delay pending appeal was not 'without sufficient cause' as required by the statute before the penalty can attach." (Emphasis added).[34]

The Eleventh Circuit relied upon *Griffin*, n.9, paraphrasing its content as follows:

> "The *Griffin* Court noted this approach after observing that under its construction of the statute, entry of judgment will not toll the penalty, unless further delays are explained by sufficient cause. 458 U.S. at 575 Note 9, 102 S.Ct. at 3252 Note 9."[35]

Griffin n.9, however, cities *Pacific Mail* as an example of 'sufficient cause' stating:

> "**When an appeal is taken on reasonable grounds, the penalty should not apply to delays in payment beyond the date on which the District Court decree is entered, since those delays are supported by sufficient cause.**" (Emphasis added.)[36]

The Eleventh Circuit's opinion is in direct and unalterable conflict with *Pacific Mail*. The effect of the

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[34] 458 U.S. 564, 102 S.Ct 3245, 3253, 73 L.Ed 2d 973 (1982)

[35] 774 F.2d 1043, 1053 (11th Cir. 1985)

[36] 458 U.S. 564, 575, n.9 102 S.Ct 3245, 3252, n.9, 73 L.Ed 2d 973 (1982)

wage penalty is harsh in the extreme. Antitrust's trebble damages pale in comparison, as do most criminal monetary sanctions. This court's supervisory action is necessary to prevent injustice to Hibernia and to insure other litigants may exercise their rights of appeal unthreatened by the specter of shattering penalties. Of equal importance is that there must be no doubt as to what the law is, otherwise future litigants may step into a trap which may threaten their economic viability. At issue here is more than right of foreign seaman to payment; the right to appellate review is threatened by the Eleventh Circuit's decision. Perhaps a National Bank such as Hibernia may have the assets to withstand the effects of a penalty during an appeal, but in the depressed state of our shipping industry, how many other shipowners will exercise any right to appeal if the Eleventh Circuit's decision remains as a statement of the law? Congress surely did not intend such a burdening of the right to appeal solely for the enrichment of seamen, American or foreign, whose favorable judgments are stayed from immediate execution by appellant's deposit with the Court of security sufficent to satisfy those judgments.

IV.

CONTRARY TO THE ELEVENTH CIRCUIT'S HOLDING, ANALOGOUS CASES IN THE SUPREME COURT AND OTHER CIRCUIT COURTS OF APPEAL HAVE HELD THAT PUBLIC POLICY PERMITS PRIVATE PARTIES TO CONTRACT FOR INDEMNIFICATION OF PENALTIES PROVIDED THE INDEMNITEE'S STATUTORY DUTY TO PAY THE PENALTY IS NOT ADVERSELY EFFECTED.

Not disputing the District Court's finding that the vessel sale contract required the prospective purchasers to indemnify Hibernia for wages and penalty wages, the Eleventh Circuit invalidated, as contrary to public policy, only that portion of the agreement which granted indemnity for penalty wages.

Whether indemnity provisions in a vessel sale contract, otherwise valid under state law,[37] are invalid as applied to penalty wages because of federal "public policy" seems to be a question of first impression. The Eleventh Circuit relied only on the RESTATEMENT 2nd of Contracts, §178, as authority for its decision, finding:

> "In our view allowing a shipowner to avoid penalty wages liability through a contract would contravene the public policy implicit in the statute."

Hibernia contends the contract provisions represent only an adjustment of the relations between private parties, which does not alter, or allow it to avoid, any of its duties as vessel owner.

Risk allocation between contracting parties is not contrary to public policy if the party upon whom a statutory duty is imposed remains liable or responsible to the statutory beneficiaries. As the Eleventh Circuit conceded, if the seaman is paid, "whatever steps an owner or

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[37] This Court has never decided whether vesel sale contracts are contracts within admiralty and maritime jurisdiction; however, the Circuit courts have decided they are governed by state law. The *ADA*, 250 F.2d 194 (2nd Cir. 1918); *Richard Bertram & Co. v. Yatch WANDA*, 447 F.2d 966 (5th Cir. 1971); *Flota Maritime v. M/V CIUDAD de la HABANA*, 181 F.Supp. 301 (D. Md.) *affirmed* 335 F.2d 619 (4th Cir. 1966).

master takes thereafter to be reimbursed is of no importance to the crew." Such actions should be of no concern to the general public and certainly should not effect public policy. Hibernia seeks not to substitute the indemnitor as the party to respond to the Koreans, but wishes to be reimbursed by reason of the indemnitor's default on a purchase agreement - absent which default Hibernia would have been relieved of its status as shipowner.

The principle is the same that is expressed in *Chicago R. I. and P. R. Co. v. Chicago B. & Q. R. Co.*,[38] wherein one railroad was required to indemnity another upon whom a statutory duty under the Safety Appliance Act was imposed. Specifically, it was found that such an indemnity was not contrary to federal public policy as the indemnified railroad still remained liable for its statutory obligation. Of a similar nature is *Ryan Mercantile Co. v. Great Northern R. Co.*[39] This Court's decision in *Transamerican FR. Lines v. Brada Miller FR. Sys.*[40] likewise embraces the same principle, although that case by its very terms is limited to a factual situation involving a regulatory duty imposed on carriers by the Interstate Commerce Commission.

Hibernia's duty to respond to penalties is not lessened by the indemnity. The Koreans always had the right to proceed against Hibernia. The plaintiffs suffered absolutely

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[38] 437 F.2d 6 (7th Cir. 1971) *cert. denied* 402 U.S. 996, 91 S.Ct. 2173, 29 L.Ed 2d 161 (1971)(cited with approval in *Transmerican FR. Lines v. Brada Miller FR. Sys.*, 423 U.S. 28, 42, 96 S.Ct. 228, 236, 46 L.Ed 2d 169 (1975))

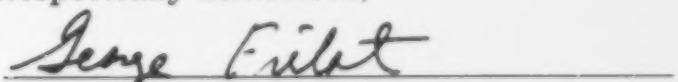
[39] 294 F.2d 629 (9th Cir. 1961) (state law statutory duties involved)

[40] 423 U.S. 28, 96 S.Ct. 228, 46 L.Ed. 2d 169 (1975)

no disability as a result of the indemnity provision; if anything, they were beneficiaries. For example, an insolvent shipowner may assert such insolvency as a defense to penalty wages, *Collie v. Fergusson*,[41] but if an indemnity agreement existed, the shipowner would have an additional source of funds with which to respond, the indemnitor would be under the same pressure as the owner to respond to avoid liability, and ultimately the purposes of the act would be fulfilled and not frustrated.

What constitutes the proper public policy with regard to indemnity for penalty wages is a significant question. The Eleventh Circuit has again moved out of step with the thinking of other circuits in analogous cases. Particularly when coupled with other vital issues raised by this petition, it is appropriate for this Court to address the issue and set public policy for the guidance of those engaged in commercial transactions who are exposed to penalties of the same or a similar nature.

Respectfully submitted,



GEORGE A. FRILOT III
TERRY A. McCALL
LEMLE, KELLEHER, KOHLMEYER,
DENNERY, HUNLEY, MOSS & FRILOT
21st Floor, Pan-American Life
Center, 601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241

ROBERT COURY
General Counsel
HIBERNIA NATIONAL BANK

ATTORNEYS FOR HIBERNIA
NATIONAL BANK IN NEW ORLEANS

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[41] 281 U.S. 52, 50 S.Ct. 189, 74 L.Ed 696 (1930)

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January, 1986, three copies of the foregoing Petition for Writ of Certiorari were served by United States Mail, postage prepaid, pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, on opposing counsel as indicated below, and on the 6th day of February, 1986, this corrected Petition for Writ of Certiorari was served in a similar manner.

George A. Frilot, III

Ross Diamond, III, Esq.
Diamond. Leon & Barter
62 N. Royal Street
P. O. Drawer 2008
Moblie, ALA 36652

Broox G. Holmes, Esq.
Allan R. Wheler, Esq.
Ambrecht, Jackson, DeMouy, Crowe,
Holmes & Reeves
P. O. Box 290
Mobile, ALA 36601

Stephen Blank, Esq.
41 East 42nd St.
Suite 1400
New York, New York 10017

J. W. Goodlow, Jr., Esq.
Vickers, Riis, Murray and Curran
P. O. Box 990
Mobile, ALA 36601

Robert S. Edington, Esq.
551 Church Street
Mobile, ALA 36602

Robert S. Oppenheim, Esq.
P. O. Box 29
Monticello, New York 12701

Accordingly, all parties required to be served have been served.

APPENDIX A

STATUTES AND CONVENTIONS

46 U.S.C § 596. Time for Payment

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account ot wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitlee to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4529; Dec. 21, 1898, c.28 §§ 4, 26, 30 Stat. 756, 764; Mar. 4, 1915, c. 153, 46 U.S.C. § 3, 38 Stat. 1164.

46 U.S.C. §10313. Wages

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of

of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for a good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht. However, this subsection applies to a vessel taking oysters.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g)When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

(h) Subsections (f) and (g) of this section do not apply to a fishing or whaling vessel or a yacht. Howeve, subsections (f) and (g) apply to a vessel taking oysters.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

(Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 566.)

Convention Concerning
SEAMEN'S ARTICLES OF AGREEMENT
ILO No. 22
38 UNTS 295
Geneva, June 24, 1926
[PREAMBLE DELETED]

ARTICLE 1

1. This Convention shall apply to all sea-going vessels registered in the country of any Member ratifying this convention and to the owners, masters and seamen of such vessels.

2. It shall not apply to-

(a) ships of war,

(b) Government vessels not engaged in trade,

(c) vessels engaged in the coasting trade,

(d) pleasure yachts,

(e) Indian country craft,

(f) fishing vessels,

(g) vessels of less than 100 tons of gross registered tonnage or 300 cubic metres, nor to vessels engaged in the home trade below the tonnage limit prescribed by national law for the special regulation of this trade at the date of the passing of this Convention.

ARTICLE 2

For the purpose of this Convention the following expressions have the meanings hereby assigned to them, viz.:

(a) the term "vessel" includes any ship or boat of any nature whatsoever, whether publicly or privately owned, ordinarily engaged in maritime navigation;

(b) the term "seaman" includes every person employed or engaged in any capacity on board any vessel and entered on the ship's articles. It excludes masters, pilots, cadets and pupils on training ships and duly indentured apprentices, naval ratings, and other persons in the permanent service of a Government;

(c) the term "master" includes every person having command and charge of a vessel except pilots;

(d) the term "home trade vessel" means a vessel engaged in trade between a country and the ports of a neighbouring country within geographical limits determined by the national law.

ARTICLE 3

1. Articles of agreement shall be signed both by the shipowner or his representative and by the seaman. Reasonable facilities to examine the articles of agreement before they are signed shall be given to the seaman and also to his adviser.

2. The seaman shall sign the agreement under conditions which shall be prescribed by national law in order to ensure adequate supervision by the competent public authority.

3. The foregoing provisions shall be deemed to have been fulfilled if the competent authority certifies that the provisions of the agreement have been laid before it in writing and have been confirmed both by the shipowner or his representative and by the seaman.

4. National laws shall make adequate provision to ensure that the seaman has understood the agreement.

5. The agreement shall not contain anything which is contrary to the provisions of national law or of this

Convention.

6. National law shall prescribe such further formalities and safeguards in respect of the completion of the agreement as may be considered necessary for the protection of the interests of the shipowner and of the seaman.

ARTICLE 4

1. Adequate measures shall be taken in accordance with national law for ensuring that the agreement shall not contain any stipulation by which the parties purport to contract in advance to depart from the ordinary rules as to jurisdiction over the agreement.

2. This Article shall not be interpreted as excluding a reference to arbitration.

ARTICLE 5

1. Every seaman shall be given a document containing a record of his employment on board the vessel. The form of the document, the particulars to be recorded and the manner in which such particulars are to be entered in it shall be determined by national law.

2. The document shall not contain any statement as to the quality of the seaman's work or as to his wages.

ARTICLE 6

1. The agreement may be made either for a definite period or for a voyage or, if permitted by national law, for an indefinite period.

2. The agreement shall state clearly the respective rights and obligations of each of the parties.

3. It shall in all cases contain the following particulars:

(1) the surname and other names of the seamen, the date of his birth or his age, and his birthplace;

(2) the place at which the date on which the agreement was completed;

(3) the name of the vessel or vessels on board which the seaman undertakes to serve;

(4) the number of the crew of the vessel, if required by national alw;

(5) the voyage or voyages to be undertaken, if this can be determined at the time of making the agreement;

(6) the capacity in which the seaman is to be employed;

(7) if possible, the place and date at which the seaman is required to report on board for service;

(8) the scale of provisions to be supplied to the seaman, unless some alternative system is provided for by national law;

(9) the amount of his wages;

(10) the termination of the agreement and the conditions thereof, that is to say:

(a) if the agreement has been made for a definite period, the date fixed for its expiry;

(b) if the agreement has been made for a voyage, the port of destination and the time which has to expire after arrival before the seaman shall be discharged;

(c) if the agreement has been made for an indefinite period, the conditions which shall entitle either party to rescind it, as well as the required period of notice for rescission; provided that such period shall not be less for the shipowner than for the seaman;

(11) the annual leave with pay granted to the

seaman after one year's service with the same shipping company, if such leave is provided for by national law;

(12) any other particulars which national law may require.

ARTICLE 7

If national law provides that a list of crew shall be carried on board it shall specify that the agreement shall either be recorded in or annexed to the list of crew.

ARTICLE 8

In order that the seaman may satisfy himself as to the nature and extent of his rights and obligations, national law shall lay down the measures to be taken to enable clear information to be obtained on board as to the conditions of employment, either by posting the conditions of the agreement in a place easily accessible from the crew's quarters, or by some other appropriate means.

ARTICLE 9

1. An agreement for an indifinite period may be terminated by either party in any port where the vessel loads or unloads, provided that the notice specified in the agreement shall have been given, which shall not be less than twenty-four hours.

2. Notice shall be given in writing; national law shall provide such manner of giving notice as is best calculated to preclude any subsequent dispute between the parties on this point.

3. National law shall determine the exceptional cir-

cumstances in which notice even when duly given shall not terminate the agreement.

ARTICLE 10

An agreement entered into for a voyage, for a definite period, or for an indefinite period shall be duly terminated by-

(a) mutual consent of the parties;

(b) death of the seaman;

(c) loss or total unseaworthiness of the vessel;

(d) any other cause that may be provided in national law or in this Convention.

ARTICLE 11

National law shall determine the circumstances in which the owner or master may immediately discharge a seaman.

ARTICLE 12

National law shall also determine the circumstances in which the seaman may demand his immediate discharge.

ARTICLE 13

1. If a seaman shows to the satisfaction of the shipowner or his agent that he can obtain command of a vessel or an appointment as mate or engineer or to any other post of a higher grade than he actually holds, or that any other circumstance has arisen since his engagement which renders it essential to his interests that he should be

permitted to take his discharge, he may claim his discharge, provided that without increased expense to the shipowner and to the satisfaction of the shipowner or his agent he furnishes a competent and reliable man in his place.

2. In such case, the seaman shall be entitled to his wages up to the time of his leaving his employment.

ARTICLE 14

1. Whatever the reason for the termination of rescission of the agreement, an entry shall be made in the document issued to the seaman in accordance with Article 5 and in the list of crew showing that he has been discharged, and such entry shall, at the request of either party, be endorsed by the competent public authority.

2. The seaman shall at all times have the right, in addition to the record mentioned in Article 5, to obtain form the master a separate certificate as to the quality of his work or, failing that, a certificate indicating whether he was fully discharged his obligations under the agreement.

ARTICLE 15

National law shall provide the measures to ensure compliance with the terms of the present Convention.

[ARTICLES 16 THROUGH 23 DELETED]

Ratifications

Argentina
Australia
Bahamas
Bangladesh
Barbados
Belgium
Belize
Brazil
Bulgaria
Burma
Canada
Chile
China[1]
Colombia
Cuba
Djibouti
Dominica
Egypt
Finland
France
Germany, Federal Republic of
Ghana
India
Liberia
Luxembourg
Malta
Mauritania
Mexico
Morocco
Netherlands
New Zealand
Nicaragua
Norway
Pakistan
Panama
Papua New Guinea
Peru
Poland
Portugal
Sierra Leone
Singapore
Somalia
Spain
Tunisia
United Kingdom

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[1] Ratification was communicated in the name of China by the authorities representing China in the ILO at the date of communication. This ratification was registered before October 1, 1949, the date on which the People's Republic of China was founded.

Iraq	Uruguay
Ireland	Venezuela
Italy	Vietnam[2]
Japan	Yugoslavia

[2] Ratification was registered after 1954 in respect of the territory of the former Republic of South Vietnam.

APPENDIX B

ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7152

CHUNG YONG IL, et al.,

Plaintiffs-Appellees,
Cross-Appellants,

and

HANSEUNG SHIPPING CO., LTD.,

Plaintiffs-Appellees,

R.S. PRICE,

Plaintiff-Intervenor,
Appellee,

versus

OVERSEAS NAVIGATION CO., LTD., and JIMMY MARDIKOS,

Defendants, Crossclaim-Plaintiffs, Counterclaim-Defendants, Third-Party Plaintiffs-Appellants, Cross-Appellees,

M.V. BEAVER SPIRIT, ETC.,

Defendant, Crossclaim-Defendant,

HIBERNIA NATIONAL BANK,

Defendant, Crossclaim-

Defendant, Counterclaim-Plaintiff, Third-Party Plaintiff-Appellant, Cross-Appellee,

versus

E.F.D. CAPITOL GROUP INC. and FRANK DEUTSCH,

Third-Party Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 25, 1985, 11 Cir., 1985, _____F.2d_____).

(November 29, 1985)

Before KRAVITCH and CLARK, Circuit Judges, and WRIGHT*, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the memebers of the Court and a majority of the Circuit Judges who are in regular service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having

voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch

United States Circuit Judge

* Honorable Eugene A. Wright, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

APPENDIX C

OPINION OF THE ELEVENTH CIRCUIT

CHUNG, YONG IL, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

and

Hanseung Shipping Co., Ltd.,
Plaintiffs-Appellees,

R.S. Price,
Plaintiff-Intervenor, Appellee,

v.

OVERSEAS NAVIGATION CO., LTD.,
and Jimmy Mardikos, Defendants, Crossclaim-Plaintiffs, Counterclaim-Defendants, Third-Party Plaintiffs-Appellants, Cross-Appellees.

M.V. BEAVER SPIRIT, etc. Defendant,
Crossclaim-Defendant

HIBERNIA NATIONAL BANK, Defendant-Crossclaim-Defendant, Counterclaim-Plaintiff, Third-Party Plaintiff-Appellant, Cross-Appellee,

v.

E.F.D. CAPITOL GROUP INC., and Frank Deutsch,
Third-Party Defendants-Appellants, Cross-Appellees

No. 84-7152.

United States Court of Appeals,
Eleventh Circuit.
Oct. 25, 1985.

Stephen Paul Blank, New York City, Robert S. Edington, Mobile, Ala., for E.F.D. Capitol and Frank Deutsch.

Allan R. Wheeler, Broox G. Holmes, Mobile, Ala., Stephen L. Oppenheim, Monticello, N.Y., for Overseas Navigation co.

Ross Diamond. III, Mobile, Ala., for Chung, Yong & Crew.

Appeals from the United States District Court for the Southern District of Alabama.

Before KRAVITCH and CLARK, Circuit Judges, and WRIGHT*, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This litigation arose out of an unperformed agreement for the purchase and sale of a cargo ship, the M/V CARMEN A.[1] Caught in the middle are twenty-three Korean nationals who served aboard the vessel, without being paid, while the parties to the contract made the arrangements necessary for the sale. The major issues on appeal relate to the district court's award of penalty wages to

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* Honorable Eugene A. Wright, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

[1] During the course of the events surrounding this litigation, the vessel's name was changed to THE M/V BEAVER SPIRIT. To avoid any unnecessary confusion, we will refer to the ship as the M/V CARMEN A.

the crew members pursuant to 46 U.S.C.A. § 596.[2] We affirm in part, reverse in part, and remand for further proceedings not inconsistent with this opinion.

I. BACKGROUND

The primary parties invovled in the events leading to the litigation include Hibernia National Bank in New Orleans (Hibernia or the Bank) and one of its vice presidents, Jay Capouch; Overseas Navigation Co., LTD. (Overseas) and its sole shareholder, James Mardikos; and E.D.F. Capital Group, Inc. (E.D.F.) and its sole shareholder, Frank Deutsch. At all relevant times the M/V CARMEN A was located at a dock in the Port of Mobile, Alabama.

On February 24, 1981, the M/V CARMEN A was seized by United States marshals in order to satisfy a stevedore lien. At that time, the vessel was documented under Liberian law, and owned by Armadora Maritima Salvadora Lines, with Hibernia holding a foreign preferred ship mortgage against the vessel. Less than three months later, on May 6, 1981, Hibernia submitted the highest bid for the vessel at a marshal's sale and became its owner. Apparently not interested in operating the ship, Hibernia immediately began negotiations to sell the ship to Mardikos. After an agreement on the terms of the sale had been reached, Mardikos was unable to secure financing from his bank. His bank, however, put him in touch with Deutsch.

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[2] Since the time that the claims involved in this case have matured, Congress has repealed 46 U.S.C.A. § 596, and other statutes involved in this case, as part of a comprehensive reorganization and recodification of the shipping code. *See* Act of August 26, 1983, Pub.L. No. 98-89, § 4(b), 97 Stat. 500. Under the terms of the repealing statute, however, this case is still governed by old section 596 since the claim involved here matured prior to the passage of the repealing statute. In future cases, penalty wage clims will be governed by 46 U.S.C.A. §10313.

Deutsch and Mardikos entered into an agreement through their respective corporations: E.F.D. was to purchase the vessel and then lease it to Overseas, which in turn agreed to operate the ship. To demonstrate his good faith, Mardikos advanced $100,000 to Deutsch.

When Hibernia learned of the substitution, new negotiations commenced. On May 28, 1981, the parties reached an agreement. E.F.D. agreed to purchase the M/V CARMEN A for $500,000; $350,000 to be paid in cash, including a $50,000 deposit to be made on June 4, 1981, with Hiberrnia agreeing to finance the remainder of the purchase price. The contract further provided that E.F.D. agreed to take the vessel "as is" and "where is." Because the vessel's registration under Liberian law was insufficient for the sale to go forward, the parties agreed that the vessel should be reinscribed under Panamanian law in Hibernia's name for E.F.D.'s account. Contemplating that the inscription would be uncomplicated, the parties agreed that the buyer would pay inscription costs up to $10,000. If the associated costs exceeded $10,000, and neither party wished to pay the excess, the agreement would be terminated and Hibernia would refund the $50,000 deposit, "provided, however, that should Buyer so elect to terminate this agreement it shall be responsible to Seller for all the aforementioned costs actually incurred by Seller toward the inscription up to the amount of $10,000." The closing of the sale was scheduled to take place within ten working days after the vessel was inscribed. If the buyer wished to withdraw at that point, Hibernia was allowed to keep the $50,000 deposit as its liquidated damages. Deutsch signed the agreement as President of E.F.D. and individually.

Shortly after the execution, Hibernia learned that

certain repars to the vessel were necessary for inscription under Panamanian law. Hibernia suggested therefore that the inscription-costs provision of the agreement by raised to $20,000, to which E.F.D. agreed. Upon further inquiry, Hibernia determined that inscription required even more extensive effort than previously anticipated. The bank initiated another amendment to the contract, to which E.F.D agreed, decreasing the amount of the purchase price the bank would finance. In addition, the amendment called for elimination of the inscription-costs ceiling and the provision requiring termination if neither party chose to bear the costs to the extent they exceeded that ceiling. As modified, the agreement provided as follows: "Inscription of the Vessel in the name of Seller shall be for the account of Buyer. Payment of the costs incurred in connection with inscription of the vessel in the name of Seller shall be made by Buyer on January 5, 1982."

Meanwhile, Mardikos began looking for a crew to operate the M/V CARMEN A. On June 4, 1981, Overseas entered into a contract with Hanseung Shipping Company, whereby Hanseung agreed to locate crew members and send them to the vessel. In the agreement Overseas purported to be acting as an agent on behalf of the M/V CARMENT A. The agreement established the wages payable to the crewmen, and set forth Hanseung's fee for its services and its right to be reimbursed for expenses.

Shortly thereafter the bank decided to permit Deutsch to oversee the repairs that werre required so that the vessel could be inscribed in the bank's name. On July 6, 1981, Markidos brought in a ship repair company to inspect the vessel. Mardikos testified that he did this after Deutsch requested that he determine the most economical way to perform the repairs. After consulting with Deutsch

and Capouch, Mardikos notified Hanseung to send a crew to the M/V CARMEN A. Twenty-two crew members flew from Korea to Mobile on July 23, boarded the vessel upon their arrival, and immediately began to perform maintenance and repair work to the vessel. An individual employed by Hibernia, who was aboard the M/V CARMEN A when the Korean crew arrived, supervised some of the repairs. In August, because of problems with the vessel's electrical system, Hanseung sent a twenty-third crew member to join the vessel. A number of independent contractors also made repairs to the ship, both before and after the crew's arrival. While this work was being done, Mardikos forwarded to Hibernia a number of invoices relating to the repairs and the crew's expenses, most of which Hibernia paid without objection. On September 3, 1981, the vessel was formally inscribed in Hibernia's name under Panamanian law.

The closing for the sale of the vessel was initially scheduled for August 14, and then postponed until August 20. Because the purchaser was not prepared to close on that date, the closing was further postponed to September 1. When the purchaser was unwilling or unable to perform on this date, and again on September 10, Hibernia informed Deutsch that if the sale were not consummated by September 18, Hibernia would consider the contract terminated. The parties scheduled a closing for that date, but postponed it once more until September 25. Again, the sale did not close. Hibernia then sent a telegram to Deutsch advising him that it would retain the $50,000 deposit and that he was "solely responsible for all of the costs and expenses incurred by Seller in connection with the inscription of the vessel and those costs incurred through your agents in Mobile." Further, the bank stated: "[i]mmediate ar-

rangements should be made to pay the costs and expenses incurred by Seller. Direct arrangements should be made with your agents in Mobile as to the payment of those other costs and expenses which you have incurred."

The next day Hanseung addressed a telegram to Mardikos, informing him that the crew had not been paid since arriving on the vessel in July, and demanding payment of these accrued wages and reimbursement for expenses Hanseung incurred in locating and sending the crew to the vessel.[3] Hanseung further admonished that in the event the crew was discharged, the crew members were entitled to severance pay and payment for the costs of returning to Korea. Mardikos forwarded this telegram to Hibernia, as he had done with invoices relating to the ship's repair, with the request that Hibernia pay the amount due. Hibernia never responded and no wages were paid.

On September 28, a Hanseung representative met with Capouch in New Orleans, at which time Capouch asked that the crew leave the vessel. The crew, however, refused to leave the ship without being paid, and along with Hanseung initiated this lawsuit, naming Overseas, Mardikos, Hibernia, and the M/V CARMEN A as defendants. The complaint called for payment of wages and expenses pursuant to the employment agreement signed by Hanseung and Overseas, and asked that penalty wages be assessed in favor of the crew under 46 U.S.C.A. § 596. The United States marshals arrested the vessel on October 1. Hibernia continued to insist that the crew leave the vessel, but refused to pay the wages earned or the costs of transportation back to Korea. Ultimately, Hibernia agreed to allow the crew members to remain, in case a prospective

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[3] Overseas had partially reimbursed Hanseung for these expenses in August of 1981.

purchaser wished to hire them. The crew members finally left the vessel and departed for Korea on November 5, 1981, with Hanseung paying their air fare.

To release the vessel from the attachment brought about by this lawsuit, Hibernia deposited a $400,000 letter of undertaking, in lieu of a bond, with the district court on November 17, 1981. With this letter, Hibernia guaranteed payment of all maritime liens against the vessel, to the extent of the undertaking.[4] Shortly thereafter, Hibernia sold the vessel to another purchaser.

Once Hanseung and the crew intitated this litigation, the proportions of the case swelled significantly. Overseas and Mardikos filed a crossclaim against Hibernia and the vessel for expenses they incurred in the vessel's service, and alleged that Hibernia should be required to reimburse Overseas and Mardikos should plaintiff succeed in imposing liability on them. Overseas also filed a complaint of intervention against the vessel for the same expenses incurred. Hibernia and the vessel responded with a counterclaim against Hanseung and the crew, a cross-claim against Overseas and Mardikos, and a third-party complaint against E.F.D. and Deutsch for breach of the sales agreement and for indemnity. Overseas and Mardikos likewise filed a third-party complaint against E.F.D. and Deutsch for indemnity and for return of a portion of the amount deposited that had not yet been returned. Finally, E.F.D. and Deutsch counterclaimed against Hibernia.[5].

After a bench trial, the court below issued its ruling.

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[4] Hibernia increased its undertaking to $782,181, in order to obtain a stay of the district court's judgment pending an appeal.

[5] There were other parties to the litigation in the district court who are not parties to this appeal.

Following a series of post-trial motions, the court amended its findings and conclusions. The court found that the vessel was liable to the crew for wages earned up until the time of the seizure and to Hanseung for its expenses, including the amounts expended in getting the crew to and from Mobile. Hibernia, as its owner, was liable in personam, for this amount. Liability for the post-seizure wages earned was imposed upon Overseas, which was also ordered to reimburse Hibernia for the costs of repatriating the crew to Korea. The court also ordered that Hibernia and the vessel were liable for penalty wages, with the penalty accruing from the date on which the complaint was filed until February 8, 1983, the date of trial. In addition, the court found that Hibernia was liable to Overseas and Mardikos for expenses incurred, management fees, and an advance made to Hanseung, because it ratified Mardikos' work by accepting the benefits of his efforts. The court further found that according to the terms of the contract E.F.D. and Deutsch individually, were required to indemnify Hibernia for all inscription costs, including the penalty wages. Finally, the court ordered Deutsch to refund the $20,000 retained from Mardikos' initial $100,000 deposit. This appeal followed. Just prior to oral argument, Hibernia paid the crew the wages that had been withheld.

II. WHETHER THE CREW WAS ENTITLED TO PENALTY WAGES

46 U.S.C.A. § 596 (1958) provides that a seaman shall recover double wages for each day payment of wages is delayed beyond the statutorily prescribed payment date, if the delay is without sufficient cause.[6] Courts have

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[6] The statue reads in full:

described this statute as "harsh," *Mavromatis v. United Greek Shipowners Corp.*, 179 F.2d 310, 318 (1st Cir.1949), "punitive," *Dendrinos v. City of New York*, 86 F. Supp. 688, 690 (S.D.N.Y. 1949), and capable of producing results that are "both absurd and palpably unjust." *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 586, 102 S.Ct. 3245, 3258, 73 L.Ed.2d 973 (1982) (Stevens, J., dissenting). Whatever courts may think of the wisdom of this statute, its purpose is to provide for the prompt payment of wages to a discharged seaman. *See Collie v. Fergusson*, 281 U.S. 52, 55, 50 S.Ct. 189, 191, 74 L.Ed. 696 (1930), and to ensure that a seaman is not turned ashore with little or no money in his pocket. *See Malanos v. Chandris*, 181 F.Supp. 189 (N.D.N.Y.1959). A seaman's claim for wages is accorded a high priority against a vessel, 46 U.S.C.A. § 953(b) (1958), and the penalty wage provision is fully consistent with the notion that a seaman has a "sacred lien" against a vessel for his earnings.

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footnote 6 continued

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in a manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters who are owners of any vessel the seamen of which are entitled to a share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts.

On appeal, Hibernia challenges only the penalty aspect of the district court's award of wages. Hibernia contends that there are three conditions precedent to an award of penalty wages under 46 U.S.C.A. § 596 (1958), all of which must be satisfied before the section can apply: (1) there must have been an agreement under which each seaman claiming penalty wages was shipped; (2) the vessel in question must have commenced and completed a voyage in which the seaman participated; and (3) the master or owner of the vessel must have refused or neglected, without sufficient cause, to pay the seaman's wages after the applicable time limitations had expired. Hibernia contends that the first two conditions in this case werre not satisfied.

Focusing on the language of the statute requiring payment of wages to a seaman "within two days after the termination of the agreement under which he was shipped." Hibernia contends that each seaman must have signed an agreement before he is entitled to receive penalty wages for non-payment. According to the bank, the agreement contemplated by this statute is that specified in 46 U.S.C.A. § 563 or § 564, and urges that we reverse the award of penalty wages for this reason. We disagree.

As an initial matter, we note that we have found no cases supportingg the proposition that a seaman claiming penalty wages must have signed articles conforming to the requirements of 46 U.S.C.A. §§ 563 or 564. *Ktistakis v. Liberian SS STAR*, 304 F.2d 356 (4th Cir.1962), citied by the bank, lends no support to its position. *Ktistakis* involved efforts by a foreign seaman aboard a foreign vessel to have articles declared void for failure to comply with the provisions of 46 U.S.C.A. § 564.[7] The Fourth Circuit

[7] The seaman apparently sought to invoke the penalty provisions of 46

refused, holding that 46 U.S.C.A. § 564, by its very terms, applies only to American-owned vessels. 304 F.2d at 358. The court in no way intimated that signed articles were a prerequisite to the recovery of penalty wages; indeed, the court observed that the penalty wage statute applied to foreign seamen aboard foreign vessels even though they were not required to sign articles as prescribed by 46 U.S.C.A. § 564. *Id.* at 358-59.

Moreover, we note that the purpose of the signed articles requirement is to protect the seamen. *Southerrn SS Co. v. N.L.R.B.*, 120 F.2d 505, 508 (3d Cir.1941), *reversed on other grounds*, 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed. 1246. The Supreme Court has recognized that the absence of a signed agreement does not defeat a seaman's right to wages, but rather allows a seaman to recover the highest wages paid at the port of embarkation and subjects the master who took him on board to certain penalties. *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 890 n. 4, 6 L.Ed.2d 56 (1961); *see* 46 U.S.C.A. §§ 564, 578. The *Kossick* Court also recognized the enforceability of oral contracts for hire in maritime law. *Id.* It would be anomalous, then, to conclude that a seaman who was not party to written articles automatically forfeits his entitlement to penalty wages. Accordingly, we hold that the crew members' failure to execute individual agreements with the vessel owner does not prohibit an award of penalty wages.

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footnote 7 continued
U.S.C.A. § 575, which provides that if a master shall carry out a seaman without signed articles, he shall pay to such seaman the highest wages which shall have been given at such port within three months next before the time of such shipping, and 46 U.S.C.A. § 578, which provides that shipments made contrary to any act of Congress shall be void, and a seaman so shipped may leave the service at any time and shall be entitled to recover the highest rate of wages of the port from which he shipped.

Turning to the second requirement advanced by Hibernia, the bank observes that the crew in this instance served aboard the vessel while it remained in the port of Mobile. The penalty wage statute, it argues, sets forth the timing for wage payment according to the kind of voyage made. According to Hibernia, the members of the crew, having neither commenced nor completed any voyage, have not fulfilled an essential prerequisite to recovery of penalty wages.

The bank derives some support for its position from *Pacific Mail SS Co. v. Schmidt*, 241 U.S. 245, 36 S.Ct. 581, 60 L.Ed. 982 (1916), in which the court held that penalty wages ceased accruing upon entry of the district court's judgment in favor of a seaman claiming disputed wages, depsite the vessel owner's continued withholding of payment while pursuing an appeal, because payment of the wages would not have been accepted by the court without payment of the penalty. In holding that the vessel owner's withholding of wages after the court's judgment was not "without sufficient cause," because the vessel owner sought to resolve on appeal "doubtful questions of law and fact" as to the applicability of the penalty, the Court initially observed that it was unclear whether the district court was justified in applying the statute to the facts before it. The seaman in that case had ended his voyage, his articles had terminated, and he received his wages. He remained aboard the vessel for one week, however, while it was in port, hoping to sign new articles. He brought the lawsuit to recover his week's wages.[8] The Court observed that the "statute deals with voyages" and "[i]t seems to us a very strong thing to say that any fair construction of the

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[8] After one week, the seaman was discharged. His demand for his week's wages was refused because of a dispute over some missing silverware.

facts brings the case within the act." 36 S.Ct. at 582. Nonetheless, the writ of certiorari had not been granted on that issue, and the Court proceeded without further discussion on the point.

Relying on this dictum, the Fourth Circuit denied penalty wages to a seaman who had decided to stay aboard a vessel after it arrived in port, hoping to sign new articles, but who became ill one day later. *Eaton v. SS EXPORT CHALLENGER*, 376 F.2d 725 (4th Cir.1967). As in *Pacific Mail*, the seaman had received payment for his service aboard the vessel under the signed articles, which terminated upon the vessel's arrival. There was, however, a delay in payment of the wages for the day the seaman became ill. The court held that the penalty wage statute was not applicable to work performed on "port time" - "when a vessel is tied up in the interim between the completion of one voyage and the commencement of another and when articles are neither in fact signed nor required." 376 F.2d at 727. *See also Compton v. Alton SS Co.*, 608 F.2d 96, 101 (4th Cir.1979) (vessel owner not subject to penalty wage statute for failure to pay amount due seaman under collective bargaining agreement for six-day period between voyages, while ship was being repaired in port).

There are no cases binding on us that hold that the penalty wage statute requires a completed voyage, or that discuss the Fourth Circuit's "port time" doctrine. In at least one case, however, penalty wages were assessed in favor of a seaman who signed a one-year contract to serve aboard a vessel, but whose wages were earned while the vessel remained in port. *Griffin v. Oceanic Contractors*, 664 F.2d 36 (5th Cir.1981), *reserved on other grounds*, 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1082). In another instance, the former Fifth Circuit affirmed an award of penal-

ty wages in favor of two seamen who signed one-year agreements to serve with a ship, joined the ship in Pascagoula, Mississippi while it was being repaired, travelled with the vessel from Pascagoula to Mobile, where it was to dry-dock for repairs, and continued to perform their duties while the ship was being repaired in Mobile until their discharge. *Caribbean Federation Lines v. Dahl*, 315 F.2d 370 (5th Cir.), *cert. denied*, 375 U.S. 831, 84 S.Ct. 76, 11 L.Ed.2d 62 (1963).[9] In affirming the award of fees, the court was aware that the vessel never made a cargo voyage. Nonetheless, the court concluded that the seamen's contracts, which bound them to the vessel wherever it might go for one year, brought them within the provisions of 46 U.S.C.A. § 596. 315 F.2d at 373.

It is true, of course, that neither case explicitly rejects the port-time doctrine or a voyage requirement. Like the crewmen in *Dahl* and *Griffin*, however, the crew in the instant case served aboard the vessel under the terms of a contract.[10] This contract bound the crew to the vessel for a one-year period, during which time they would be required to go with the vessel wherever it might go. Accordingly, we think that these crew members werre entitled to payment under the terms of 46 U.S.C.A. § 596.

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[9] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[10] The court below found that the agreement signed by Hanseung and Overseas was the contract by which the crew was employed. The court also found that Hibernia had accepted the benefits of Mardikos as its agent and agent for the vessel throughout the transaction thereby requiring it to stand liable as principal for debts incurred by the agents. Hibernia challenges neither of these findings on appeal, but does argue that the contract was conditional upon sale of the vessel. This condition, however, was quite obviously waived by the conduct of the parties.

Although the statute does call for payments to be made at a certain time, depending on the kind of voyage, nothing in the statute mandates that the vessel commence and complete a voyage in which the seaman participated before the seaman is entitled to penalty wages. If Congress had intended to impose a voyage requirement, it could have chosen clearer language than it did. The purpose of the statute would hardly be furthered by our imposing such a requirement, and we decline to do so. In the present case, the wages that were earned over a three-month period were withheld, placing the crew members in the position of having to sue to obtain them. Indeed they were also required to leave the vessel before payment was made. Accordingly, we hold that the fact that the crew did not participate in an actual voyage does not prohibit the members from collecting penalty wages.

We think our position is reconcilable with the Fourth Circuit's cases decided under the port-time doctrine. The court below found that the crew's service aboard the M/V CARMEN A was governed by the terms of an employment contract. Although it was not executed individually by the crew members, it was nonetheless a contract. Both *Compton* and *Eaton* involved seamen whose service aboard a vessel had terminated according to their signed articles. Both had been paid wages due under the terms of their articles, and both had claimed additional amounts due for periods not covered by any agreement calling for the service aboard a vessel. Hence, even assuming we were to adopt the port-time doctrine, it would not apply to this case.

III. WHETHER THE COURT ERRED IN HOLDING THAT E.F.D. AND DEUTSCH WERE RESPONSIBLE

FOR THE PENALTY WAGES

The court below ruled that the contract for the sale of the vessel required E.F.D. and Deutsch to indemnify Hibernia for all inscription costs, including the penalty wages assessed in the crew's favor. E.F.D. and Deutsch contend that allowing the vessel's owner to shift the effect of the penalty wage statute violates public policy. Accordingly, they argue that Hibernia should be responsible for the payment of the penalty. Hibernia does not respond directly to this argument, but insists that E.F.D. and Deutsch agreed to pay all inscription costs, and contends that this provision should be enforced.[11]

Section 178 of the *Restatement* (Second) *of Contracts* (1979) provides:

> A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against enforcement of such terms.

Section 179 of the *Restatement* states that public policy against "the enforcement of promises or other terms may be derived by the court from...legislation relevant to such a policy..." As previously mentioned, the penalty wage statute was intended as a means of ensuring prompt pay-

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[11] None of the parties make any suggestion as to whose public policy we should consider, although the contract contains a choice of law provisions stating that Lousiana law should be applied to construe the agreement. Nonetheless, the underlying claim in this case is not based on the contract, but is a claim within the court's admiralty jurisdiction for wages due. Part of the claim is a request for penalty wages made under a federal statute. Accordingly the case is governed by federal law and not by Louisiana contract law.

ment of wages to discharged seamen. *Collie v. Fergusson*, 281 U.S. 52, 55, 50 S.Ct. 189, 191, 74 L.Ed. 696 (1930). Imposition of liability is by no means purely compensatory. The coercive effect of the statute is designed to prevent arbitrary refusals to pay wages. *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982); *Swain v. Isthmian Lines Inc.*, 360 F.2d 81 (3d Cir.1966). As the Surpeme Court stated in *Griffin*, "although the sure purpose of the statute is remedial, Congress has chosen to secure that purpose through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment." 458 U.S. at 572, 102 S.Ct. at 3250. Indeed, the *Griffin* Court recognized that the statutue could authorize an enormous windfally to seamen but observed that the very nature of punitive remedies is to allow awards that may be out of proportion to actual injury. *Id.*

The statute itself speaks in terms of assessing penalty wages against only a vessel owner or a master, and a case decided by the new Fifth Circuit involving the statute has so interpreted it. *See Caldwell v. Solus Ocean Systems*, 734 F.2d 1121, 1123 and n. 3 (5th Cir.1984) (holding that a crew member has no cause of action under section 596 against the charterer of a vessel who is neither the owner nor the master of the vessel, and noting that neither the briefs nor independent research had divulged any cases imposing section 596 penalty wages on any person other than an owner of master), *cert. denied*,_____U.S._____, 105 S.Ct. 434, 83 L.Ed.2d 360. *Cf. International Pain Co. v. M/V MISSION VIKING*, 637 F.2d 382, 385 (5th Cir. Unit B 1981) (holding that crew members employed and paid by an independent contractor have a preferred maritime lien for the wages against the vessel on which they serve; other-

wise a shipowner could circumvent traditional protections afforded seamen by procuring their services through independent contractors).

In our view allowing a shipowner to avoid penalty wages liability through a contract would contravene the public policy implicit in the statute.

The coercive nature of the statute on vessel owners could be lessened if we were to allow indemnification for penalty wages. The purpose of the provision is to ensure prompt payment of wages by a vessel owner or master. If the master or owner is not the crew's employer, indemnification can be sought for *wages* tendered. In the meantime, the crew members, who have expended their efforts serving aboard the vessel, are entitled to be paid. Of course, it could be argued that so long as there is a coercive effect on someone, be it the vessel owner or master, or an indemnitor, prompt payment can be assured. Congress, however, has placed the onus on a vessel owner or master, once a demand has been made, to insure prompt payment. Whatever steps an owner or master takes thereafter to be reimbursed is of no importance to the crew. Although it is not certain that Congress foresaw this precise situation when enacting section 596, the circumstances surrounding this case evidence the importance of refusing to allow a vessel owner to shift responsibility for penaltty wages. The crew served aboard the vessel for over two months without being paid, through no fault of their own; the dispute was between the parties to the contract for the sale of the vessel over who would pay the wages. Hibernia paid a substantial portion of the inscription costs on the vessel, apparently with the belief that the purchaser would indemnify them for these amounts, yet it witheld the crew's wages, even though repairs to the vessel performed by the crew accrued to

Hibernia's benefit. Accordingly, we hold that the court below erred to the extent that it required E.F.D. and Deutsch to indemnify Hibernia for the penalty wages.

IV. WHEN THE PENALTY SHOULD STOP ACCRUING

In *Griffin v. Oceanic Contractors*, 458 U.S 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), the Supreme Court held that courts are not vested with discretion to limit the period during which penalty wages are assessed. The petitioner in that case brought suit for $412.20 in unpaid wages. The district court awarded the wages and penalty wages to petitioner, but halted the accrual of penalty wages at the date of petitioner's new employment, even though he had not been paid at the time, and was not paid until after the district court entered judgment, over four years later. Writing for the Court, Justice Rehnquist recognized that "[i]t is highly probable that respondent is correct in its contention that a recovery in excess of $300,000 in this case greatly exceeds any actual injury suffered by petitioner as a result of respondent's delay in paying his wages," but observed that the "remedy for any dissatisfaction with the results of particular cases lies with Congress and not with this Court." 458 U.S. at 575-76, 102 S.Ct. at 3252.

After citing *Griffin* for this proposition, the court below found that payment was withheld without sufficient cause, but nonetheless stopped the accrual of penalty wages as of February 8, 1983, the day trial began. Both the crew and Hibernia contend that the court selected the wrong date. In their brief, the crew members urged that because the wages were still unpaid, the penalty continued

to accumulate.[12] Hibernia argues that any penalty should be assessed only until November 17, 1981, when it filed an undertaking with the court, in order to secure release of the M/V CARMEN A, obligating itself to be bound in an amount up to $400,000 if it were adjudged liable on the claims filed against it. Hibernia draws support for its position from *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3d Cir.1966) in which the court observed in dicta that a vessel owner can terminate the running of the penalty once suit has been filed by depositing the allegedly unlawfully withheld wages with the court. *Id.* at 88 n. 26; *see also Southern Cross SS Co. v. Firipis*, 285 F.2d 651, 659-60 (4th cir.1960) (district court did not abuse its discretion by requiring vessel owner to deposit earned wages and penalty wages with the court in order to prevent further accumulation of penalties on appeal), *cert. denied*, 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859 (1961). The *Griffin* court noted this approach after observing that under its construction of the statute, entry of judgment will not toll the penalty period unless further delays are explained by sufficient cause. 458 U.S. at 575 n. 9, 102 S.Ct. at 3252 n. 9.

We decline to follow the Third Circuit's suggestion. The statute clearly dicates that the master or owner "shall pay to the seaman" the double wages "for each and every day payment is delayed," if the failure to pay is "without sufficient cause." 46 U.S.C.A. § 596. If sufficient cause does not exist, the vessel owner must make the payment as prescribed by the statue. Although this may place a vessel owner in a difficult position, that is precisly the statute's intent. A vessel owner who refuses to tender wages and who forces a seaman to institute a lawsuit to

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[12] At oral argument, the crew conceded that payment of their wages just prior to oral argument tolled the penalty as of the date of payment.

recover the amount claimed risks having a court find that he withheld wages without sufficient cause, thereby subjecting himself to penalty wage liability. The *Swain* court recognized that "it is precisely the possibility that large penalties will accrue that should motivate a shipowner to exercise care in computing wages due a seaman." 360 F.2d at 87. Appellant's suggestion would allow a vessel owner whose position borders on the frivolous to continue to litigate and withhold wages without fear of an increased penalty. Nothing in the laguage of the statute, or the underlying policies, supports this.

The Third Circuit apparently was concerned that a seaman might purposefully delay prosecuting his suit once it is filed to allow further accumulation of penalties. 360 F.2d at 88 n. 26. We in no way sanction such conduct. Federal Rule of Civil Procedure 41(b), however, provides a method for dealing with such actions, and such a concern does not warrant ignoring the language of the statute.

Moreover, we note that Hibernia posted the undertaking in order to secure release of the vessel, which had been seized with the commencement of this litigation. We can discern no reason why this action should have tolled the penalty wage statute, nor have we found any authority to support such a proposition.

Turning to the crew members' contention that the district court erred in prohibiting further accrual beyond the date of trial,* we agree that the accrual of the penalty

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* Petitioner's note

By "Memorandum to Counsel" dated October 30, 1985 the Clerk of the Eleventh Circuit advised published opinion dated October 25, 1985 had been corrected to read as appears in the remainder of this paragraph. The prior language which does not appear in the published opinion, 774. F.2d 1043 (11th Cir. 1985), was as follows:

> ...we are unsure why the court ruled as it did. The court recognised that the statute does not make inposition of the penalty a discretionary matter, and also held Hibernia's actions were without sufficient cause. Accordingly we vacate that portion of the court's judgment limiting the penalty wages and remand for reassessment of the penalty."

should stop only when the wages are paid. The statute does not make imposition of the penalty a discretionary matter, and the court below held that Hibernia's actions were without sufficient cause. Accordingly we vacate that portion of the court's judgment limiting the penalty wages and remand for reassessment of the penalty to include accrual of the penalty wages up until the date of payment.

V. WHETHER DEUTSCH IS PERSONALLY LIABLE UNDER THE CONTRACT

Deutsch contends that the contract to sell the vessel, pursuant to which the court below ordered that E.F.D. and Deutsch indemnify Hibernia for all inscription costs, was entered into by E.F.D as a separate entity. Hence, according to Deutsch he is not liable in his individual capacity. On a related issue, Deutsch challenges the district court's admission of parol evidence when the agreement contained an integration clause.

We first address the parol evidence question. Parol evidence is admissible to explain an ambiguity in a contract when such explanation is not inconsistent with the written terms. *Scafidi v. Johnson*, 420 So.2d 1113, 1115 (La.1982). The court below admitted testimony from Capouch that at the time the contract was executed, he requested that Deutsch sign the contract in his individual capacity. Deutsch did in fact sign the document twice - once as president of E.F.D. and once individually. Deutsch explains his individual signature by stating that his role in the contract as guarantor of the purchase price is spelled out, but that in no way did he intend to become individually responsible for any other matter. Indeed, the contract lists only E.F.D. as purchaser. We cannot say, however, that admission of Deutsch's testimony was erroneous. Deutsch's signature could be viewed as holding himself individually responsible under the contract. Accordingly, we cannot say it was an abuse of discretion to admit the

evidence. Nor can we say that the district court was clearly erroneous in finding that Deutsch agreed to become a party to the agreement.

VI. WHETHER THE LIQUIDATED DAMAGES PROVISION SHOULD HAVE BEEN ENFORCED

The contract for the sale of the M/V CARMEN A contained a liquidated damages provision allowing Hibernia to retain to $50,000 deposit. Nonetheless, the district court refused to enforce the provision, holding that the agreement to pay the inscription costs was separate from the balance of the contract, and that allowing E.F.D. and Deutsch to so enforce the provision would be unconscionable. In addition, the court concluded that principles of equitable estoppel should apply to disallow enforcement of that provision.

E.F.D. and Deutsch attack all three conclusions, arguing that their liability should be limited to the $50,000 deposit described in the contract as liquidated damages. They argue that the district court erred in finding that the liquidated damages provision related only to ensure Hibernia the benefit of its bargain, and in finding that the agreement to pay the inscription costs was a separate provision. As an initial matter, we note that this is an unusual claim - most litigation of liquidated damages provisions involves claims by the breaching party that a clause should not be enforced because the agreed upon damages are excessive. Here, E.F.D. and Deutsch argue that the payment of the liquidated sum should allow them to escape their obligation under the contract. The presence of a liquidated damages provision in a contract is not ordinarily construed in such a fashion. *See Restatement* (Second) *of Contracts* § 361 Comment a (1979) ("Merely by providing for liquidated damages, the parties are not taken to have fixed a price to be paid for the privilege not to perform.").

In any event, we cannot say that the district court's finding that the liquidated damages provision was independent of the agreement to pay all inscription costs, and that the buyer agreed to pay inscription costs even if he did not go through with the contract, are clearly erroneous. The contract itself is ambiguous and the evidence before the district court was conflicting. Accordingly, we affirm the district court's decision to refuse to limit E.F.D.'s and Deutsch's liability to forfeiture of the $50,000 deposit. We do note, however, that Hibernia is entitled to reimbursement for inscription expenses only to the extent that they exceed the liquidated sum. Because of our holding we need not discuss the court's refusal to enforce the liquidated damages provision on grounds of unconscionability and equitable estoppel.

VII. LIABILITY FOR POST-SEIZURE WAGES

After the vessel was arrested at the commencement of this litigation, the crew stayed aboard the vessel. The court below found that Hibernia permitted this, after initially demanding their removal, at Hanseung's request, in the event that a perspective purchaser might want to employ them. In addition, the court found that they had no where else to live. The court noted that, absent special circumstances, a crew member has no lien against a vessel for post-seizure wages. *See* Gilmore & Black, *The Law of Admiralty*, 605-06 (1975). Observing that at the time of the seizure the crew was aware that the contract for sale of the vessel had been severed, the court concluded that any post-seizure work performed could not have been expressly or impliedly authorized so as to bind the vessel; in addition, the court noted that Hibernia had hired a guard to watch

the vessel following seizure, so that this was not a service the crew was performing. Thus, no special circumstances existed and no lien against the vessel for post-seizure wages was awarded. Nonetheless, the court awarded the crew members their basic allotment for the period they remained aboard the M/V CARMEN A, ordering that Mardikos and Overseas were liable for this amount.

Overseas and Mardikos assert that the district court was incorrect in imposing liability on them for post-seizure wages. First, they contend that crew members have a lien against the vessel in whose service they labor regarr less of the identity of the employer. *International Paint Co. v. M/V MISSION VIKING,* 637 F.2d 382 (5th Cir. Unit B 1981). The district court was correct, however, in observing that ordinarily no lien arises against a vessel for post-seizure wages and Mardikos and Overseas do not challenge the court's finding that there were no special circumstances that would warrant creation of the lien in this instance. Mardikos and Overseas next contend that although Overseas did sign the contract that employed the crew, it did so only as agent for the vessel. It is true that one who acts in the capacity of an agent for a disclosed principle is not liable for claims arising out of a contract executed by the agent on behalf of the principle. *Lake City Stevedores v. East West Shipping Agencies,* 474 F.2d 1060, 1063 (5th Cir.1973). The court below made no specific findings or conclusions as to whether Mardikos was acting in an agency capacity at the time, and if so, for whom, or whether the agency relationship ended, and what effect, if any, that would have on the liability of Overseas. In addition, the court never explained why Mardikos should be individually liable for this amount. Because this portion of the court's decision is unclear, we vacate the award as against

Mardikos and remand for further consideration.

VIII. THE CREW'S TRANSPORTATION EXPENSES

Hanseung, which is not a party to this appeal, sought reimbursement of the costs it incurred when it advanced the crew members' air fare from Mobile to Korea. The district court held that Hanseung had a lien against the M/V CARMEN A for this and other amounts. One day after issuing its amended findings and conclusions, the court entered judgment in favor of Hibernia and against Overseas in the amount of $16,399, the amount Hanseung paid to bring the crew members back to Korea. No explanation accompanies this entry of judgment, and we are unable to discern its basis from the court's finding. Accordingly, we vacate that portion of the judgment and remand for findings on this issue.

IX. WHETHER DEUTSCH IS INDIVIDUALLY RESPONSIBLE FOR REPAYING MARIKOS' DEPOSIT

The court ordered Deutsch to return the $20,000 retained from Mardikos' $100,000 deposit. Deutsch does not dispute this amount is owed to Mardikos, but he contends that the $100,000 was advanced to E.F.D., the $80,000 returned was paid by E.F.D., and that E.F.D. alone is responsible for paying the remaining $20,000. The evidence before the district court as to who was responsible for refunding the deposit was conflicting. The court heard considerable testimony on this matter, and we cannot say its decision to order Deutsch to return the $20,000 was clearly erroneous.

X. WHETHER THE COURT SHOULD HAVE AWARDED PREJUDGMENT INTEREST

In entering judgment, the district court awarded prejudgment interest on numerous claims, but did not order that Overseas receive prejudgment interests on the $20,000 award from Deutsch. Overseas and Mardikos contend that the court abused its discretion in failing to make this award.

Although an admiralty court has discretion to grant or deny prejudgment interest, the general rule in admiralty cases is that prejudgment interest should be awarded absent peculiar circumstances.*Miller Industries v. Caterpillar Tractor Co.*,733 F2d 813, 822 (11th Cir.1984); *Dow Chemical Co. v. M/V GULF SEAS*, 593 F.2d 613, 614 (5th Cir.1979). And, although most of this circuit's authority on the subject addresses the propriety of prejudgment interest in tort cases, it is equally appropriate in a breach of contract action. *International Paint Co. v. M/V MISSION VIKING*, 637 F.2d 382, 386 (5th Cir. Unit B 1981). Prejudgment interest is not a penalty, but rather is in the nature of compensation for the use of funds. *Socony Mobil Oil Co. v. Texas Coastal and International Inc.*, 559 F.2d 1008, 1014 (5h Cir.1977).

Here the court offered no explanation why it did not award prejudgment interest on the $20,000 sum. Without any explanation, we cannot determine whether peculiar circumstances were applicable in this instance. Accordingly, we remand the issue to the district court to make this determination in the first instance.

AFFIRMED in part, REVERSED in part and REMANDED in part.

APPENDIX D

OPINION OF THE DISTRICT COURT, AS CORRECTED

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CHUNG YONG IL, et al,	*	
Plaintiff,	*	
vs.	*	CIVIL ACTION NO. 81-0728-T
OVERSEAS NAVIGATION CORP., et al,	*	
Defendants.	*	

CORRECTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 8, 9, and 10, 1983, the above-styled case was heard before this court on all the issues. On March 3, 1983, the case was taken under submission by the court and after consideration of the evidence presented, the pleadings filed, and the arguments of counsel, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Parties

This suit was instituted by twenty-three (23) Korean nationals and Hanseung Shipping Co., Ltd. (Hanseung) seeking to recover wages, other benefits and agency fees with respect to certain work or services performed aboard the M/V CARMEN A during a period in mid-1981.

At all times material hereto, Hibernia National Bank in New Orleans (Hibernia) was the owner of the M/V CARMEN A.

E.F.D. Capital Group, Inc. (EFD) is a New York corporation engaged in the business of raising venture capital and Frank Deutsch (Deutsch) is its president and sole stockholder and director. Mr. Deutsch is a citizen of a state of the United States other than the State of Alabama. He is a resident of New York, New York.

Overseas Navigation Corporation (Overseas) is a New York corporation engaged in the shipping business and James Mardikos (Mardikos) is a president and sole stockholder of Overseas. Mr. Mardikos is a citizen of a state of the United States other than Alabama. He is a resident of New York, New York.

Mr. R. S. Price was at all times relevant to this litigation employed as agent for the vessel by Mardikos and the Overseas.

The Vessel

The vessel which is the subject of this litigation is the M/V CARMEN A.[1] The M/V CARMEN A is a merchant vessel operated on the navigable waters of the United States of America, and at all relevant times material to this suit, she was docked in the Port of Mobile. The defendants, during part of these transactions sought to redocument the vessel and this redocumetation included a name change. Hence, references to the M/V BEAVER SPIRIT, the proposed new name, and those to the M/V CARMEN A are synonymous. [2]

On February 24, 1981, the M/V CARMEN A was a Liberian documented vessel that was owned by Armadora Maritima Salvadorena (Armasal Lines). On February 24, 1981, she was arrested by the United States Marshal in the Port of Mobile, Alabama, for non-payment of stevedoring and other services to the vessel. At the time of said arrest, Hibernia held a foreigh preferred ship mortgage against the vessel and intervened in the pending action to protect its interest. On May 6, 1981, the M/V CARMEN A was sold at public auction by the United States Marshal with Hibernia having the highest bid of $440,000.00. Accordingly, Hibernia became the owner of the vessel.

Upon becoming owner of the M/V CARMEN A, Hibernia immediately sought to sell it, negotiating first with the Defendants, Mardikos and/or Overseas.

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[1] a/k/a M/V BEAVER SPIRIT

[2] It should be noted that although the vessel's new name was printed along her side, she was never officially documented under the name M/V BEAVER SPIRIT.

On or about May 6, 1981, Mardikos was advised to get in touch with Deutsch as a possible purchaser of the vessel. After discussion between the two, the decision was made that an entity owned or controlled by Deutsch would purchase the vessel and charter or lease it to an entity owned or controlled by Mardikos. The chartering entity would have the option to purchase the vessel at its market value at the end of a specified period.

Under the proposed arrangement with Deutsch, Mardikos or his entity would operate the vessel and would pay charter hire to Deutsch or his entity. If the charter hire exceeded $2,700.00 per month, the excess was to be split between Deutsch or Mardikos or their respective entities.

Mardikos and one of his partners advanced $100,000.00 to Deutsch or E.F.D., which funds were required by Deutsch as a good faith deposit to demonstrate that Mardikos had sufficient capital to operate the vessel. E.F.D. wrote three checks totaling $20,000.00 to Overseas during the month of September 1981, (at least $10,000.00 of which was renumeration for the Korean crew) and refunded $40,000.00 on January 8, 1982. Therefore, E.F.D. paid $2,400.00 to Overseas on January 19, 1982.

The vessel's previous documentation under Liberian law failed to meet the requirements for documentation in the name of a new owner. The contract entered into between Hibernia and E.F.D. called for the vessel to be inscribed in the name of the seller, Hibernia, under Panamanian law, and for the sale to take place within ten working days after such inscription.

The contract of purchase and sale is designated

"Agreement to Buy and Sell by and between Hibernia National Bank in New Orleans (Seller) and E.F.D. Capital Group, Inc. (Buyer)" and is dated May 28, 1981. (Hibernia's Exhibit No. 10, which is attached hereto as Appendix A). The agreement provides in substance that the purchase price is $500,000, payable $350,000 cash and $150,000 to be financed by Hibernia as follows: $50,000 six months after closing or January 5, 1982, whichever occurs later, and $100,000 twelve months thereafter, together with interest thereon. The contract provides for a deposit or down payment of $50,000 on or before June 4, 1981, and further provides that the vessel will be sold "as is" and "where is".

The agreement is signed on behalf of E.F.D. Capital Group, Inc. by "Frank Deutsch, President" and is also signed "Frank Deutsch (Individually)".

Hibernia has a policy that requires its officers to prepare loan memorandums on certain larger loans such as the proposed financing with EFD/Deutsch. In accordance with this policy, Jay Capouch, a loan officer with Hibernia, preparted such a memorandum the day after the agreement was signed. The memorandum provides in the first sentence: "We have agreed to sell the M/V CARMEN A to Frank Deutsch under the terms and conditions outlined in the May 28, 1981 Agreement to Buy and Sell." Other pertinent provisions of the loan memorandum provide as follows: "E.F.D. has agreed to take the M/V CARMEN A 'as is, where is' so that Hibernia should have no obligation for any repairs. E.F.D. will also pay legal expenses up to $10,000 required to license the vessel under the Panamanian flag."

Under the terms of the Buy-Sell Agreement, the

inscription of the vessel was to be in the name of the Seller for the account of the Buyer. The agreement further provided that if the inscription expenses exceeded $10,000.00 several options were available including the following:

1. Buyer could elect to pay the excess;

2. Buyer could elect not to pay the excess, in which case Hibernia could elect to pay the excess; or

3. If neither Buyer nor Hibernia elected to incur the excess, the agreement would be terminated and the $50,000.00 deposit returned to Buyer, "provided, however, that should Buyer so elect to terminate this agreement it shall be responsible to Seller for all the aforementioned costs actually incurred by Seller toward the inscription up to the amount of $10,000.00."

Under any of these options the agreement obligates the Buyer to pay inscription expenses up to $10,000.00 irrespective of whether or not the Buyer elected to terminate the contract.

At the time the buy-sell agreement was entered into on May 28, 1981, it was contemplated that the legal, administrative and miscellaneous transfer expenses necessary to redocument the vessel under Panamanian Flag would approximate $10,000.00.

Shortly after the buy-sell agreement was entered into, Hibernia learned that it would not be a simple matter to obtain the various certificates required for Panamanian registry. Specifically, in order to obtain the required safety certificates certain repairs would have to be made to the

hatches in order that they might be made water-tight, that all firefighting equipment must be brought to current standards, that all lifesaving equipment be brought up to class, and that all communications equipment be tested and recertified. It was further learned that this additional work would substantially increase the anticipated inscription expenses. Hibernia then initiated an amendment to the contract, confirmed by telex, raising the inscription costs provision to $20,000.00.

Soon after the foregoing amendment, Hibernia apparently became aware that, in order to document the vessel in its name, it would be necessary that the vessel pass full survey and therefore, the total cost of inscription could greatly exceed the previous estimate of $20,000.00. Hibernia then initiated a second amend to the contract, the agreement which was confirmed by telex, eliminating the contractual ceiling of costs of inscription.

Deutsch testified that his understanding of the amendment was that he would pay all costs of inscription whatever they might be. Although Deutsch maintained that any obligation in this connection was expressly contingent upon a closing, the amendment clearly sets forth a time certain: January 5, 1982. In his counterclaim against Hibernia, Deutsch admits that these increased costs were anticipated to range from $20,000.00 to $100,000.00.

In paragraph 2 of the buy-sell agreement, Hibernia warrants that the vessel would be free and clear of all liens at the time of the closing of the sale. There are two warranties made by the bank in this regard. The first of those is:

> "Seller warrants and guarantees that title to the vessel *at the time of closing* shall be free

> and clear of all liens and encumbrances whatsoever, and the sale of the vessel will be made with full warranty as to title." (Emphasis added.)

The contract then contains an additional, more specific, warranty made by Hibernia, as seller:

> "Seller further warrants and guarantees that *any and all liens* that arise before closing but are asserted within eighteen months after closing *shall be the responsibility of the seller.*" (Emphasis added.)

The Court specifically finds that, by virtue of such language contained in its contract, Hibernia has contractually bound itself to be liable, *in personam,* on all claims arising thereafter within this transaction which would constitute *in rem* liens against the vessel. The Court thus finds that Hibernia thereby bound itself, *in personam,* for the amounts claimed herein by the Plaintiff crew, the Plaintiff Hanseung Shipping, and the Intervenor, R. S. Price, when their services were later employed with reference to this vessel. Such *in personam* liability remains upon the bank, regardless of its entitlement or lack of entitlement to indemnity from any of the other parties defendant herein, and regardless of whether any other parties defendant might be jointly liable with Hibernia on such claims.

The Crew

On or about June 4, 1981, the Defendants, Mardikos and Overseas, entered into a contract with Hanseung Shipping Co., Ltd., of Busan, Korea, wherein Hanseung agreed to locate and send to the vessel a competent crew for its

operation, which crew was to be employed by one or more of the Defendants herein. The contract establishes the wages payable to the crew after their employment and sets the amount payable to Hanseung Shipping as fees for its services and for reimbursement of expenses.

Hibernia contends that it did not engage any of the other Defendants to act on its behalf. However, the Court finds that by virtue of a continuum of action on the part of Hibernia, it accepted Mardikos as its agent and as agent for the vessel throughout this transaction, wherein the bank was seeking to have the vessel documented in its name, as owner, under the laws of Panama. At some point in late June or early July 1981, Hibernia elected to permit the purchasers to oversee repairs to the M/V CARMEN A, which were necessary before the vessel could pass full survey, an essential element in having the vessel documented in the name of the bank. It clearly accepted the benefit of the activity of Mardikos and also of Mr. R. S. Price, Intervenor, who was employed by Mardikos as sub-agent for the vessel. During the period in question, Hibernia continued to receive from Mardikos and Price various invoices related to the vessel without objection. Further, Hibernia paid the vast majority of such invoices without objection and without reference to whether such expenses were related to inscription, crewing of the vessel, or the preparation of the vessel to load cargo for its intended voyage. Hibernia, having thus accepted the services of Mardikos and Price, as agents, must now stand liable as principal for debts incurred by those agents.

On approximately July 6, 1981, Mardikos had United Ship Repair, Inc., of Brooklyn, New York,, send a man to Mobile to inspect the vessel. According to Mardikos, this was accomplished in response to Deutsch's

request that Mardikos determine the most econommical way to accomplish the various repairs. In approximately mid-July 1981, Mardikos employed a local agent in Mobile to assist him, Mr. R. S. Price.

In late July 1981, Mardikos contacted Hanseung Shipping and directed that a crew be sent to the vessel. Mardikos discussed with Deutsch the desirability of bringing in a crew prior to the notification to Hanseung. By telexes dated July 21, 1981, Hanseung advised Mardikos and Price that the crew was scheduled to arrive in Mobile on July 23, 1981.

On or about July 23, 1981, the crew was transported from Korea to Mobile and placed aboard the M/V CARMEN A with the prior knowledge and permission of Hibernia and Deutsch. Both Douvlis Ensign Chartering (Douvlis), the United States Agent for Hanseung, and Mardikos talked to Mr. Capouch prior to the crew's transportation and boarding of the vessel.

The crew consisted of twenty-two of the individual Plaintiffs herein. Those men, and their job classifications are as follows:

(1) Chung, Yong Il; Captain
(2) O, Weon Bog; Chief Mate
(3) Im, Gyeong Cheol; Second Officer
(4) Gang, Hae Lyong; Third Officer
(5) Jo, Yang Myung; Chief Engineer
(6) You, Bong Gie; First Assistant Engineer
(7) Yu, Dong Jyu; Second Assistant Engineer
(8) Yi, Hi Un; Third Assistant Engineer
(9) Kim, Tea Ik; Radio Officer
(10) Kim, Jeong Ro; Bosin

(11) Lee, Bong Bum; AB Seaman
(12) Yu, Chang Bok; AB Seaman
(13) Im, Gwang Su; AB Seaman
(14) Kim, Gi Hwi; Sailor
(15) Jang, Ho Sam; Deckboy
(16) Han, Jong Yeol; No. 1 Oiler
(17) Sin, Gyeong U; No. 2 Oiler
(18) Bak, Yeong Han; No. 3 Oiler
(19) Song, Il Sick; Engineroom Boy
(20) Tak, Il Ji; Electrician
(21) Yeo Yu Ong; Chief Steward
(22) Son, Cheol Geun; Messboy

Because of complications with or the extent of work needed upon the electrical system of the vessel, approximately three weeks after the arrival of the original twenty-two crewmen, Hanseung was requested to send an additional electrician, and the twenty-third crewman, Lee Joe Ho, electrician, joined the vessel on August 13, 1981.

After joining the vessel , the crew worked daily in the maintenance, repair, upkeep and improvement of the vessel to the benefit and enhancement of said vessel and its owner. During the first few weeks the Korean crew was on the vessel, Mr. Van Dermeer, an employee of Hibernia, was aboard the CARMEN A. He was aware of the work being done and there is evidence that he supervised some of the repairs.

A large number of the inscription type repairs were performed by Bender Welding and Machine Co., Inc., and other independent contractors. Bender repaired the hatches, repaired the lifeboats, painted the new name of the vessel, repaired portions of the electrical system, installed the missing winch motors, repaired the crane motor and performed other services at a costs of $22,896.00. Unitor inspected, repaired and recertified the fire fighting equipment at a cost of $8,996.93. ITT Makay inspected, repaired

and recertified the communication equipment at a cost of $4,673.55 and a new life raft was ordered from J. D. Emge at a cost of $3,071.93. These changes total $39,638.41. E.F.D. and Deutsch engaged Mardikos and Overseas as their agent to oversee these various repairs and Mardikos/Overseas, in turn, employed the local agent, Price. Deutsch's employee, Chuck Perrone, also worked with Mardikos on certain limited matters. There are many documents in evidence that reflect Mardikos' involvement with the vessel in Alabama.

The first closing of the sale was scheduled for August 14, 1981, but was postponed until August 20, 1981. Closings were again scheduled on August 20, 1981, and September 1, 1981. In both of these instances Hibernia was ready to close, but the purchaser was unwilling or unable to close on these dates. On September 3, 1981, the vessel was formally documented under the laws of Panama in the name of Hibernia. Another closing was scheduled on September 10, 1981. When the purchaser failed to appear at this scheduled closing in New Orleans on September 10, 1981, Hibernia sent a telegram to Deutsch advising that if the sale was not consummated by September 18, 1981, it would consider the contract terminated. A closing was, in fact, scheduled for September 18, 1981, and was again postponed to September 25, 1981. When the purchaser failed to attend the closing on September 25, 1981, Hibernia sent a mailgram to Deutsch advising that the $50,000.00 was forfeited and:

> Furthermore, you are solely responsible for all of the costs and expenses incurred by seller in connection with the inscription of the vessel and those costs and expenses which you have incurred

> through your agents in Mobile. Immediate arrangements should be made to pay the costs and expenses incurred by seller. Direct arrangements should be made with your agents in Mobile as to the payment of those other costs and expenses which you have incurred.

Shortly after declaring the contract of sale in default on September 25, 1981, Hibernia became aware that the wages of the crew, as well of the expenses of transporting them to the vessel, had not been paid. On September 26, 1981, Hanseung sent a telex to Overseas and Mardikos, demanding payment of the wages earned by the Plaintiff crew for the months of July, August and September, plus reimbursement of the expenses Hanseung had incurred or paid in locating the crew and transporting them to the vessel and its fees for the three months in question. Of the expenses paid out by Hanseung, only $10,000.00 had been reimbursed it by Overseas in August, 1981. The same telex also demanded payment of severance pay to the crew and the cost of their repatrition to Korea in the event they were to be discharged from the vessel. Mardikos sent that telex to Hibernia, with a request that Hibernia pay the amounts due. Hibernia never responded to this request from Mardikos.

On September 28, 1981, Douvlis met Capouch in New Orleans and Capouch requested that the crew be removed from the vessel. This suit was filed on September 30, 1981, and the M/V CARMEN A was arrested by the United States Marshal on the claims of the Plaintiffs herein on October 1, 1981.

At the end of October 1981, Hibernia again insisted

that the crew leave the vessel. Hibernia again refused to pay the wages earned by the Plaintiff crew and refused to pay the cost of their transportation back to Korea. After a few days delay in arranging customs and immigration services and airline tickets, the Plaintiffs left the vessel and flew back to Korea on November 5, 1981. The cost of their airfare in the sum of $16,399.00 was paid by Hanseung.

Therefore, on or about November 13, 1981, Hibernia posted an undertaking herein in the sum of $400,000.00 to secure the release of the vessel from the attachment by the Plaintiffs herein. In such undertaking, Hibernia guaranteed the payment of all maritime liens against the vessel to the extent of the undertaking.

The Court finds that the Plaintiff crew are entitled to the recovery of their wages earned during the months of July, August and September 1981, under the terms of the contracts by which the crew was employed. The amounts recoverable by each individual Plaintiff are set forth in the appendix attached hereto and incorporated herein. The Court finds that such earned wages were due and payable on October 1, 1981.

Plaintiffs have included a claim for overtime wages, asserting the existence of an agreement to pay them overtime and alledging the they worked a number of hours of overtime. Certain alleged overtime records were introduced into evidence. No agreement to pay overtime has been shown, nor what the overtime rate might be. The Hanseung agreement specifies that the monthly lump sum payment, $24,987.25, covers all wages and bonuses and Mardikos testified that he did not discuss with the captain the payment of overtime or extra wages and that he did not

request that the work be performed on an expedited basis. He expected the work to be performed during normal hours.

The Court finds that Hibernia, as owner of the vessel, is ultimately liable *in personam* for the wages earned by the crew through September 30, 1981, regardless of whether any of the other Defendants might also be jointly liable *in personam* or whether Hibernia might have an entitlement to indemnity from one or more of the other Defendants.

The Court has found that the Defendants, Mardikos and/or Overseas, presented a request to Hibernia for payment of the crew wages in late September 1981. Hibernia failed to respond to such request in any manner and failed to take any steps whatsoever at the time to secure payment of the crew by the other Defendants. It is undisputed in the evidence herein that the Defendants, Hibernia National Bank, Mardikos/Overseas and Deutsch/E.F.D., had the financial ability to pay the earned wages of the crew, at the time such wages were payable.

The Plaintiff, Hanseung Shipping Company, was employed as agent to locate, gather together and transport to the vessel a competent crew. It was also to provide a payroll service to the employer of the crew by distributing the wages earned to the families of the individual crewmen. Under the terms of its contract, Hanseung was to be reimbursed its expenses paid in locating the crew, transporting them from their homes in Korea, obtaining their medical exams and placing their documents in order, and in providing their air transportation to the vessel. Hanseung also paid the cost of the transportation of the crew back to

Korea when all of the Defendants refused to do so. Its contract also provided that Hanseung was to receive a monthly fee for its services. In its claim for reimbursement of expenses and its fee for services, Hanseung stands in the position of any other entity which has provided services to a vessel, and has a maritime lien against the vessel for such expenses and fees. The Court finds that Hanseung paid out expenses which include crew dispatching expenses in the sum of $11,700.00, air transportation from Korea to the vessel in the sum of $16,399.00, and air transportation from the vessel back to Korea in the sum of $16,399.00. Hanseung also paid Logan Steamship Agency $695.00 for local transportation and other expenses related to repatriating the crew, and purchased food for the crew during the month of October, when the Defendants refused to do so, in the sum of $1,541.00, for which it is also entitled to reimbursement herein. The fees due Hanseung under its contract for the months involved are: July, $861.00; August, $2,600.00; September, $2,600.00. Such fees total $6,061.00. Of the amounts due Hanseung, it received the sum of $10,000.00 from Overseas in August 1981, leaving Hanseung with a net claim herein in the sum of $42,795.00. The Court finds that such amount, plus interest thereon since November 1, 1981, is chargeable to Hiberniaa under its undertaking herein, as a lien against the vessel.

The Intervenor, R. S. Price, was employed as agent for the vessel by Mardikos or Overseas. His employment as such agent was accepted by Hibernia. The Court finds that the Intervenor, R. S. Price, is entitled to recovery of fees in the sum of $3,738.19 and reimbursement of expenses in the sum of $931.05. The claim of Mr. Price in the total sum of $4,669.24, plus interest thereon from November 1, 1981, is clearly a maritime lien against the vessel and chargeable to Hibernia under its undertaking posted herein.

The Plaintiffs and the Intervenor are entitled to prejudgment interest.

It is undisputed that Mardikos and Overseas incurred the following expenses and costs in acting as agent for the vessel on behalf of E.F.D. and Hibernia as owner:

Operating Expenses	$17,016.53
Miscellaneous Expenses	174.00
Management Fee	19.000.00
Amount advanced from Overseas to Hanseung	10,000.00
TOTAL	$46,190.53

The reasonableness of these expenses in undisputed.

CONCLUSIONS OF LAW

Jurisdictional Matters

This Court has jurisdiction over the subject matter of these proceedings pursuant to 28 U.S.C. §1333.

E.F.D. and Deutsch have asserted the defense of lack of *in personam* jurisdiction. The Court finds that they are both subject to the jurisdiction of this Court.

Rule 4(e) of the Federal Rules of Civil Procedure provides that the statute or rule of court of the state in which the district sits shall govern the service of process of non-resident parties. The governing rule of court in Alabama is Rule 4.2 of the Alabama Rules of Civil Procedure. Rule 4.2(a)(2), A.R.C.P., sets out the standards governing when a non-resident has sufficient contracts with Alabama in order to be subjected to *in personam* jurisdiction. Subdivision (A) of 4.2(a)(2) states that a "person" has sufficient contracts with Alabama when that person transacts any business therein, In fact, under the Alabama statute, "the

cause of action need not rest on activities rising to the dignity of doing business but can be predicated on the mere performance of any work or service in the state." *Schoel v. Sikes Corporation,* 533 F.2d 930, 933 (5th Cir. 1976). Subdivision (I) of 4.2(a)(2) states that even if the contracts of the person in question fail to satisfy the requirements of subdivisions (A) - (H), that person will still be deemed to have sufficient contracts with this state, provided that there are "some minimum contacts" and "it is fair and reasonable to require the person to come to this state to defend an action." Of course, a "person" within the meaning of the rule may be either an individual or a corporation, Rule 4.2(a)(3), A.R.C.P. The "mimimum contacts" are deemed sufficient under Rule 4.2(a)(2)(I) so long as the prosecution of action against the person "is not inconsistent with the constitution of this state or the Constitution of the United States." Indeed, it has been consistently held by the Fifth Circuit Court of Appeals that the scope of substituted services in Alabama is as broad as the permissible limits of due process. *Schoel v. Sikes Corp.,* 533 F.2d 930 (5th CIr. 1976).

It is clear that E.F.D. and Deutch have more than the minimum contracts with this state that is required to subject them to *in personam* jurisdiction. See *Flying Saucers, Inc. v. Moody,* 421 F.2d 884 (5th Cir. 1970). The facts in the present case are somewhat analogous to the facts in *Flying Saucers,* a Fifth Circuit case arising in the State of Florida. In *Flying Saucers,* the Defendant, a Texas resident, contracted to purchase a ship located in Miami, Florida. Shortly after the initial conversation between Plaintiff and Defendent, Defendant sent his agent to Miami. The agent conducted a trial run with transactions of this nature, the cumulative effect of which far surpasses

the "minimun contracts" required to sustain *in personam* jurisdiction. This Court finds it to be fair and reasonable to require E.F.D. and Deutch to defend this action in Alabama under the circumstances here presented.

Personal jurisdiction in Alabama depends on the Defendant's having notice through perfected service of process and the presence of sufficient minimum contacts to render it just and reasonable to force the Defendant to come to Alabama and defend the suit. *Crawford v. Minutemen Gourmet Foods, Inc.*, 489 F.Supp. 181 (M.D.Ala. 1980). In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), a case which involved a suit in tort, the Supreme Court noted that the element of intent in conducting business activities should be considered. At least one Alabama Court has applied the "evidence of the non-resident corporation's intent with regard to conducting activities within the forum state" test in suits involving the breach of a written contract. *Id.*

Finally, the Alabama Supreme Court has stated that the inconvenience which would result to a corporation in conducting a trial away from its home and principal place of business should be taken into account. *Semo Aviation, Inc. v. Southeastern Airways Corp.*, 360 So.2d 936 (Ala. 1978). In the case at hand, the vessel which was the subject of the buy-sell agreement was at all relevant times within the Port of Mobile. The Korean crew performed all work aboard the vessel in the Port of Mobile, and Mr. Deutsch and E.F.D. through its agents contracted for work to be done on and for the vessel here in the Port of Mobile. Accordingly, the Court finds sufficient contracts to warrant personal jurisdiction over Mr. Deutsch and E.F.D. The Court further finds less inconvenience in its requiring Mr.

Deutsch and E.F.D. to defend this suit in the Southern District of Alabama than in some other Court.

E.F.D. and Deutsch also contend that the forum selection clause in the buy-sell agreement is sufficient to oust this Court of jurisdiction. The provision provides: "The parties further agree that any actions brought under this agreement shall be brought in a Court of law in the State of Louisiana." The Fifth Circuit has held that claused of this nature do not mandate enforcement by the Courts, *In Re Unterweser Reederei, GMBH*, 428 F.2d 888 (5th Cir. 1970); *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 F.2d 297 (5th Cir. 1958). This is particularly true in an *in rem* action of this nature where the contractually designed forum, Louisiana in this instance, would not provide a more convenient forum and would result in deplicitous litigation and a waste of judicial economy.

Claim for Earned Wages

The most basic claim presented herein is for recovery of the wages earned by the officers and crew of the vessel from the beginning of their service at least until their attachment of the vessel to secure their claim for wages. The evidence presented by the crew as to the wages earned by them, and still unpaid, was substantially uncontradicted. A small portion of their base wages, totaling $1,400.00 per month, was to have been paid to the vessel for monthly distribution in cash to the individual Plaintiffs. Such was paid to them for the months of July and August, but not thereafter. Under the terms of their contract, the Plaintiff crew was to receive a yearly bonus and annual leave pay, which ordinarily would have been paid to them at the end of their employment. This renumeration for the months of

July, August and September amounts to $4,224.74. By virtue of the contract of employment, since the Plaintiff crew was terminated within the first six months of employment, they are also subject to entitlement to receive severance pay amounting to two months of their base wages, payable to them on their discharge from the vessel, in the total sum of $28,600.00.

Seamen have a lein against the vessel in whose service they labored even if the seamen are employed by pesons other than the vessel owner. *International Pain Co., Inc. v. M/V VIking*, 637 F.2d 382 (5th Cir. 1981).

The Court therefore holds that Hibernia, as owner of the vessel at all times, is liable *in personam* for the wages earned by the Plaintiff crew during the months of July, August and September 1981. There is also no doubt that the wages earned by the Plaintiff crew constitute a maritime lien against the vessel of the first priority, and chargeable to Hibernia under its undertaking posted herein, regardless of by whom the crew were employed or sent to the vessel.

Severance Pay, Bonus and Annual Leave

Pursuant to their contract of employment, the Plaintiff crew was entitled to servence pay, yearly bonus and annual leave. Such items are in fact compensation or wages which accrue and are earned during the seaman's employment with only the payment thereof deferred until the completion or termination of that employment. The contract clearly called for the payment of two months wages to each man in the event his employment should be terminated within the first six months of service. The yearly bonus and annual leave are earned and accrued monthly under the

terms of the contract. The Plaintiff crew are clearly entitled to *in personam* anl *in rem* recovery of each, as earned wages. *Bender Welding & Machine Co., Inc. v. M/V Sovereign Opal*, 415 F. Supp. 772 (S.D.Ala. 1976).

Post Seizure Wage Claim

Plaintiffs claim basic wages for the period they were on the ship subsequent to arrest and seisure. Plaintiffs are not entitled to payment out of the vessel proceeds for any service furnished on or subsequent to October 1, 1981, the date that the vessel was seized. It is generally recognized that, absent special circumstances, a lien does not arise for wages earned after seizure. *Peterson v. S.S. Wahcondah*, 216 F.Supp. 642 (D.La.1963).

The Court finds no special circumstances which would warrent the granting of a post seizure lien in this case. Several days before the vessel was arrested, Capouch advised Douvlis that he wanted the crew removed from the vessel. After seizure of the vessel, Hibernia permitted the crew to remain aboard the vessel at the instance and request of Hanseung. The purpose of this accommodation was to provide an opportunity for future employment in the event prospective purchaser needed a crew, which would also prevent repatriation. Further, Plaintiffs had no other place to live at the time. When a crew remains on board because it lacks altenate shelter, the crewman are clearly not entitled to a lien for post seizure wages. *Medina v. Marvirazon Compania Naviera, S.A.*, 533 F.Supp. 1279 (D.Mass. 1982). By the time the vessel was seized, Deutsch and Mardikos had severed their contacts with the ship and the crew well knew of the problem. This was manifested by the filing of the lawsuit. Any work performed to the vessel after seisure cannot be reasonably said to be expressly or impliedly authorized so as to bind the vessel.

It was not necessary for the safety or welfare of the vessel that the crew remain on board. On September 25, 1981, Hibernia engaged a guard service to watch the vessel. After seizure this Court appointed Bender Shipyard as a substitute custodian and Bender thereby became charged with all of the duties and responsibilities of a custodian. Plaintiffs moved the Court to appoint Bender. Bender was capable of handling security and whatever other custodial services which might be required. This case clearly does not fall within the exception to the general rule prohibiting liens from arising against a vessel in *custodia legis* set forth in *New York Dock Co., v. S.S. Poznan*, 274 U.S. 117 (1927). However, the basic crew allotment during this period may be recovered from Overseas and Mardikos under the Hanseung contract.

Claim for Penalty Wages

Plaintiffs also claim penalty wages under 46 U.S.C. §596. This section provides for the payment of two days' pay for each and every day payment is delayed where non-payment is predicated upon refusal or neglect "without sufficient cause." This a penal statute that has recently been given a strict and literal construction, *Griffin v. Oceanic Contractors, Inc.*, ____U.S.____, 102 S.Ct. 3245 (1982). Under the *Griffin* case, a District Judge no longer has the discretion to choose an appropriate period for the imposition of penalty wages.

This Court is fully aware of the apparent inequities that arise as a result of the application of the penalty which 46 U.S.C. §596 imposes. However, under the Supreme Court's recent interpretation of the statute in *Griffin* taken with the policy articulated in *Collie v. Ferguson*, 281 U.S. 52 (1930) wherein the Court stated that the statute's

purpose was to prevent arbitrary refusals to pay wages and induce prompt payment when payment is possible, the Court is of the opinion that the crew was denied their earned wages without sufficient cause.

Therefore, the Court finds that all members of the crew, excepting the Master, are entitled to penalty wages from October 1, 1981, the date said wages became due, until February 8, 1983, the date upon which this action was heard by the Court. *Ramsey v. M/V MODOCK*, 372 F.Supp. 1131 (E.D.La. 1974), *aff's* 546 F.2d 908 (5th Cir. 1977).

Obligations of E.F.D. and Deutsch

Hibernia dealt with Deutsch individually as well as with E.F.D. Capital Group, Inc. The Buy-Sell Agreement of May 28, 1981, was signed by Deutsch individually and by Deutsch in his capacity as President of E.F.D. Capital Group, Inc. Deutsch's attorney was present when the contract was signed and participated in the negotiation, drafting and execution of the contract. The evidence presented showed that a corporation not yet formed by Deutsch was to be the actual owner of the CARMEN A and that another corporation (also not yet in existence) was to be the operator of the vessel. All of this was known to Hibernia at the time it entered into the May 28th agreement. Since Deutsch had represented to Hibernia that he considered himself and E.F.D. to be one and the same, he was asked to and did sign the agreement in his individual capacity. He intended to obligate himself individually and this is supported by the evidence.

Both Deutsch and E.F.D. are individually liable to Hibernia under the May 28th agreement. Although the general rule is that a person who signs a contract but is not named therein is not liable as a party, there are exceptions to the rule when circumstances dictate. When a contract purports to be on behalf of a corporation only, but a person signs the contract in his representative capacity as well as individually, that person may be individually liable under the contract.

Under the agreement of May 28, 1981, E.F.D. and Deutsch were obligated to reimburse Hibernia for all inscription costs up to $10,000.00, whether or not the sale was completed. Even if E.F.D. and Deutsch elected to terminate and recover the $50,000.00 deposit, they would still be liable up to $10,000.00. This obligation was entirely separate and independent of the liquidated damages provision. The liquidated damages clause relates only to the loss of the benefit of the bargain resulting from a breach and does not relate to the inscription expenses.

The language used in the contract relating to inscription expenses clearly supports this construction. Shortly after the May 28th agreement was entered into, it became obvious that inscription expenses would significantly exceed the original $10,000.00 estimate. As a result it became nesessary to amend the contract. This amendment was reflected in the telex of June 5, 1981. The effect of the amendment was to remove the $10,000.00 limitation and to make E.F.D. and Deutsch liable for the full amount of inscription expenses whatever they might be and irrespective of whether or not the proposed sale actually took place. The amendment recites that they will pay such expenses, not at closing, but upon a specified date: January 5, 1982.

In addition, Deutsch is estopped from asserting the liquidated damages provision of the contract as a defense. It would be unconscionable to allow Deutsch to assert liquidated damages as a defense in this case. Deutsch, through his agent, Mardikos, caused the crew to be brought over initially, resulting in a large nember of claims being asserted against Hibernia and the vessel. The evidence showed that Hibernia was ready, willing and able to close the May 28th agreement on numerous occasions, beginning in approximately mid-August 1981, and that at least six closings were scheduled by Hibernia and not attended by Deutsch. Deutsch testified that he breached the contract because he thought he had a chance of purchasing the vessel for less money. Deutsch apparently decided this after he caused substantial expenses to be incurred in connection with the vessel. A party should be estopped from asserting legal rights to the detriment of another party when to do so would be unconscionable. See *Travelers Indem. Co. v. Swanson*, 662 F.2d 1098 (5th Cir. 1981).

Indemnity from E.F.D., Deutsch, Overseas and Mardikos

E.F.D., Deutsch, Overseas and Mardikos, through their actions in contracting for the crew and other services caused certain lien claims to be asserted against the vessel. E.F.D. and Deutsch must indemnify Hibernia on the basis of their contractual obligations under the May 28th agreement. In accordance with the conversations between Deutsch and Capouch wherein the buy-sell agreement was amended by telex increasing the amount of projected inscription costs. Deutsch and E.F.D. were ultimately liable for all inscription costs as of January 5, 1982.

Hanseung's Claim

The Plaintiff, Hanseung Shipping Company, Ltd., is entitled to recovery of its expenses paid in its service as crewing agent for the vessel. In providing such services to the vessel, Hanseung has the same category of maritime lien as would other suppliers of goods and services to the ship. It is entitled to a maritime lien of that priority for its expenses paid. Of course, from a lien standpoint, Hanseung would stand in the shoes of the Plaintiff crew for the repatriation expenses it advanced to them and for food and provisions it supplied to the vessel. *International Paint Co. v. M/V Mission Viking*, 637 F.2d 382 (5th Cir. 1981). The Court has previously found that Hanseung, after crediting the $10,000.00 previously paid by Overseas, is entitled to a recovery in the net amount of $42,795.00. Hanseung is also entitled to interest on such amount at the rate of ten percent per annum, accruing since November 1, 1981.

Claim of R. S. Price

For the same reason, the Intervenor, R. S. Price, is entitled to the recovery of his fees and expenses in the sum or $4,669.25, plus interest accruing thereon at ten percent per annum from November 1, 1981. He was employed purely as ship's agent, and worked toward the accomplishment of the purposes of Hibernia and the other Defendants.

Pre-Judgment Interest

The Plaintiffs and Intervenor are entitled to prejudgment interest under the General Maritime Law on all sums owed them, as indicated herein. Upon the facts in this case, the Plaintiff crew, as well as Hanseung and Price, are each entitled to the recovery of interest on the sums due them, in addition to the penalty wages awarded herein. Prejudgment interest is compensatory in nature and man-

dated under admiralty law in practically every case. *International Paint Co., Inc. v. M/V Mission Viking*, 637 F.2d 382 (5th Cir. 1981).

Claims of Overseas and Mardikos

With respect to the claims of Mardikos and Overseas for expenses and costs incurred in the capacity of agent for the vessel for the benefit of the vessel and its owner, the Court finds that Hibernia by its acquiescence and acceptance of the benefits bestowed upon the vessel did in fact authorize and ratify the work performed by Mardikos and sub-agent Price. *Atlantic & Gulf Stevedores v. M/V Grand Loyalty*, 608 F.2d 197 (5th Cir. 1979).

Conclusion

The preceding complexity of events arouse due to the attempted sale of a vessel, located in the Port of Mobile, by Hibernia National Bank, located in New Orleans, to Mr. Frank Deutsch and E.F.D., located in New York. Pursuant to a poorly chartered course, the sale was never consummated and this litigation arose.

The contract under which the Korean crew was employed was between Hanseung, the crewing agency, and Mardikos, the projected charterer and agent for the vessel and projected buyer. However, the vessel owner received the benefits of the crew's work up and until the time of the vessel's arrest. Therefore, the Court finds that the Plaintiff-crew has a valid claim against the vessel *in rem* and against Hibernia *in personam* for the amount of earned wages, excluding overtime and including penalty wages from the time of the vessel's arrest until the date of trial.

The Court also finds that the crew is not entitled to wages from Hibernia for the month of October 1981, but rather, the Plaintiff-crew is entitled to their crew allotment from Overseas Navigation and Mardikos pursuant to the terms of their contract of employment.

The Plaintiff Hanseung Shipping is entitled to recovery against the vessel and Hibernia for its expenditures in transporting the crew to the vessel, its fees due under contract, and for the repatriation expenses which includes the cost of transporting the crew from the vessel in Mobile back to Korea and for the money expended by Hanseung for the crew's local transportation and expenses, including food for the crew.

The Court finds that the expenses incurred by Hibernia were a direct result of the activities initiated by Deutsch and E.F.D., and that Deutsch and E.F.D. should be estopped from asserting any defenses against Hibernia.

The Court further finds that Hibernia is entitled to a judgment against E.F.D. and Deutsch in an amount equal to any *in personam* claims received against it in this litigation.

The Court finds that R. S. Price is due to recover his agency fees and reimbursement of his expenses from the vessel and Hibernia, acquiescence to his work having been made.

Mardikos and Overseas claim a statutory lien against the vessel pursuant to 46 U.S.C. §971, et seq., for operating expenses, management fees, and the advancement made to Hanseung. The Court finds that Hibernia accepted the benefits of Mardikos/Overseas work as agent

and therefore the expenditures are due to be recovered from Hibernia.

Mardikos/Overseas further claim entitlement to $20,000.00 being the balance due on a deposit to Deutsch. The Court finds that Mardikos/Overseas is due recovery of said amount from Deutsch.

A Judgment in accordance with the foregoing Findings of Fact and Conclusions of Law will be forthwith entered.

DONE this the **9th** eay of **February**, 1983.

/s/ Daniel H. Thomas

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHUNG YONG IL, et al,	*	
Plaintiffs,	*	
vs.	*	CIVIL ACTION NO. 81-0728-T
OVERSEAS NAVIGATION COMPANY, LTD., et al,	*	
Defendants.	*	

ORDER

On October 7, 1983, the Court entered Findings of Fact, Conclusions of Law and Judgment in the above matter. Various motions to Alter, Amend and/or Correct the Findings of Fact were subsequently filed by all of the parties. Said motions were argued, briefed and considered by the Court. Some of the motions, the Court feels, have merit and some not.

Accordingly, corrected Findings of Fact and Conclusions of Law and Judgment are being filed this date contemporaneously with this order. All other pending motions, other than those ruled on in this corrected Findings of Fact and Conclusions of Law are DENIED.

DONE this the 9th day of February 1984.

/s/ Daniel H. Thomas

DANIEL H. THOMAS, U.S. DISTRICT JUDGE